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U.S. GOVERNMENT PRINTING OFFICE

34062

BURTON R. COLBERT,
Appellee,

vs.

HARRY E. WING,
Appellant.

12 4/60
105
INTERLOCUTORY APPEAL FROM
CIRCUIT COURT OF COOK COUNTY.

250 I.A. 597

MR. PRESIDING JUSTICE MASURELY
DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory injunction restraining the prosecution of a suit at law.

By his bill complainant sought the correction or reformation of a contract dated March 30, 1925, made between the parties for the purchase and sale of certain real estate. It was alleged that it was intended by the contract to provide that certain restrictions, not questioned, should be effective until January 1, 1950, but by mistake of the scrivener who prepared the contract it recited that the restrictions should be effective until January 1, 1925; that in ignorance of this mistake in date, complainant signed and delivered the contract. When the parties met to close the matter, complainant tendered a deed reciting that the restrictions should be effective until January 1, 1950. Defendant refused to accept the same on the ground that this date in the deed did not correspond with the contract date for the expiration of the restrictions, namely, January 1, 1925, and brought suit at law against complainant for damages for breach of contract. Thereupon complainant filed the instant bill, setting forth the above matters and alleging that complainant did not discover the mistake until he tendered his deed, which the defendant refused to accept. The bill prayed for the reformation of the contract so as to recite that the restrictions were effective until 1950 and for an injunction restraining the defendant from prosecuting the law suit.

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This is an official copy of the report of the

Commissioner of the General Land Office

for the year ending December 31, 1901.

The report of the Commissioner of the General Land Office for the year ending December 31, 1901, is herewith submitted. It contains a full and complete statement of the work of the Department during the year, and also a statement of the condition of the public lands at the close of the year.

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Pursuant to notice of the motion for temporary injunction, defendant appeared and resisted the same. After hearing before Judge Friend the temporary injunction was granted. No appeal was prayed from this order. Subsequently defendant moved that the injunctive order be vacated. It appears that defendant also filed general and special demurrers, which demurrers were argued at the same time that defendant's motion to dissolve the injunction was argued. The motion to dissolve was denied and the demurrers were overruled and defendant was ruled to answer within fifteen days.

Defendant's brief and argument present only questions touching the correctness of the order of the trial court overruling the demurrers. We have already held in other cases that the purpose of the statute in allowing appeals from interlocutory orders is not to determine the rights of the parties, but only to determine whether the party probably is entitled to the relief sought. McDougall Co. v. Woods, 247 Ill. App. 170; Friedman v. Peckler, 255 Ill. App. 199. In the first of these cases we said:

"The primary purpose of the statute is to permit a review of the exercise of the discretion lodged in the chancellor with the purpose of determining whether the interlocutory order probably was necessary to maintain the status quo and preserve the equitable rights of the parties."

In the second case it was said:

"An interlocutory appeal was not intended as a short cut to an appeal tribunal, in order to dispose of a cause upon its merits, without giving the trial court an opportunity to first consider it."

In the instant case the demurrers were argued and overruled and defendant ruled to answer. He did not elect to stand by his demurrers but seeks by this appeal to have their merits determined. We do not approve of this practice. On the face of the bill it appears that the contract dated March 30, 1925, provided for a sale subject to restrictions expiring January 1, 1925. This alone would indicate a probability that

complainant was entitled to the relief he sought. The bill presents at least a prima facie case, calling for a temporary injunctive order restraining the prosecution of the suit at law until the merits of the principal controversy are determined. The order is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

[illegible]

1894

THE UNIVERSITY OF CHICAGO

33547

MAZEL KNOLL,
Appellee,

vs.

CONTINENTAL LIFE INSURANCE
COMPANY, a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

25 C I.A. 597³

MR. PRESIDING JUSTICE MCGURELY
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of a judgment against it for \$2353.75 entered upon the pleadings in a suit to recover under an accident insurance policy issued by defendant to Merle Knoll, plaintiff's son, who was accidentally killed October 7, 1926.

To plaintiff's declaration defendant filed special pleas, to which plaintiff demurred. Defendant withdrew all of its pleas except the second and fourth. Upon hearing plaintiff's demurrers to these were sustained and defendant electing to stand by its pleas judgment followed.

Defendant first asserts that the declaration is insufficient as not stating a cause of action and that its motion in arrest of judgment should not have been overruled. The policy covers accidents "by the wrecking or disablement of any private automobile, motor driven car or horse-drawn vehicle in which the insured is riding or driving, or by being accidentally thrown from such wrecked or disabled automobile, car or vehicle." The declaration alleged that the insured "was accidentally killed while riding on a gasoline speeder, said gasoline speeder being a motor-driven vehicle," and that in accordance with the provisions of the policy there was due the plaintiff the sum therein named.

It will be seen at once that the allegations of the declaration do not specifically come within the terms of the policy imposing liability. There is no allegation that the vehicle in which the insured was riding was wrecked or disabled nor that

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FEDERAL BUREAU OF INVESTIGATION

22-111-228

U. S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

By this report, the Bureau is advised that the following information was received from the Bureau of Motor Vehicle Registration, State of New York, on February 10, 1934:

The Bureau of Motor Vehicle Registration, State of New York, has advised that the following information was received from the Bureau of Motor Vehicle Registration, State of New York, on February 10, 1934:

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he was accidentally killed by reason of the wrecking or disablement of the vehicle, neither is it alleged that he was killed by being accidentally thrown from such wrecked or disabled vehicle, nor that the vehicle was private. It is argued that as far as these allegations are concerned, insured might have been accidentally shot or struck by something and, in general, that the declaration does not state the circumstances or conditions of the accidental death so that it would appear that the accident came within the terms of the policy. Defendant did not demur to this declaration and while, critically examined, it might be said to be defective in its omission of necessary allegations, we are inclined to hold that it comes within the rule that, even where there is a defect in the declaration which would have been fatal upon special demurrer, yet if the issue joined were such as necessarily required on the trial proof of the facts so defectively set out or omitted, and without which it is not to be presumed that either the judge would direct the jury to give or the jury would have given the verdict, such defect is cured by verdict or judgment. Miller v. Kresge Co., 306 Ill. 104; Chicago & Grand Trunk Ry. Co. v. Spurney, 197 Ill. 471; Corlett v. Illinois Central R.R. Co., 241 Ill. App. 124.

The decisive question is whether the court properly sustained the demurrers to defendant's pleas. These pleas set up, in substance, that the insured at the time of the accident resulting in his death was in the employ of the New York Central Railroad Company and on duty, and that the policy does not cover accidents received by "Employees of Railroads *** while on duty."

The validity of these pleas depends upon the construction of the terms of the policy. The provisions in question are as follows:

"GENERAL PROVISIONS"

"This insurance does not cover (1) Suicide or attempt thereof while sane or insane; (2) While riding or driving in races or any driver or occupant of any automobile in any race or speed contest anywhere or while testing any automobile on any race track or speedway; (3) While engaged in military or naval service; (4) Any Law Enforcement Officer while on duty; (5) Employees of Railroads or City Fire Departments while on duty; (6) Unless sustained in the United States or Canada."

Plaintiff contends that the last provision qualifies number 5 immediately before it, and that properly construed it means that the insurance does not cover accidents to employees of railroads except when sustained in the United States or Canada; that is, it covers all accidents to railroad employees happening in the United States or Canada.

We hold that such a construction is improbable and unreasonable. The manifest intention of the "General Provisions" is to state the character of accidents which the policy does not cover. Read in its entirety, as it must be, it means that the insurance does not cover suicide, injuries received in races or while the insured is engaged in military or naval service or received by any law enforcement officer while on duty or by any employee of railroads or city fire departments while on duty, nor any accident unless it is sustained in the United States or Canada.

The character of the policy clearly indicates this, aside from the language of this provision. It is not a general accident policy but is limited and restricted in its terms. It is sold by a newspaper and is "issued exclusively to regular subscribers of the Chicago Herald and Examiner." The annual premium is \$1.10. It provides for indemnity "to the extent herein limited and provided." We would expect in such a policy some provision limiting the territory covered by the policy, and the sixth provision of the "general provisions" clearly limits the territory to the United States or Canada.

As was said in the recent case of Konstantelos v. Great American Casualty Co., 241 Ill. App. 283:

"The phraseology of insurance policies must be construed according to the same general principles that are pertinent in the interpretation of written contracts generally."

Contracts of insurance should be given a fair, reasonable and sensible construction and not one which is strained, forced and unnatural. 32 C. J. 1151; Crandall v. Continental Casualty Co., 179 Ill. App. 330. In Kelly v. Brotherhood of R. R. Trainmen, 308 Ill. 508, the court said:

"A contract of insurance cannot, any more than any other contract, be given an interpretation at variance with the clear sense and meaning of the language in which it is expressed."

See also Dick v. Goldberg, 295 Ill. 86; Hartsock v. Kaskaskia Livestock Ins. Co., 223 Ill. App. 433; Clarke & Co. v. Fidelity & Casualty Co., 220 Ill. App. 576.

We hold that the demurrers to defendant's pleas should have been overruled. The judgment is therefore reversed and the cause is remanded for further proceedings consistent with what we have said in this opinion.

REVERSED AND REMANDED.

Hatchett and O'Connor, JJ., concur.

as was said in the report of the committee.

Great attention was given to the report.

The importance of the report was emphasized by the fact that it was the first time that the committee had been able to give a full and complete report.

Reports of the committee were given in full, and the

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33700

HAZEL HODGE,
Defendant in Error,

vs.

HARRY ALLEN,
Plaintiff in Error.

25a
ERROR TO MUNICIPAL COURT
OF CHICAGO.

256 I.A. 597⁴

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Judgment by confession for rent under a lease was entered against defendant, which was opened up and defendant permitted to plead. Upon trial by the court the finding was against the defendant and judgment was entered for \$350.

Defendant asserts that by mutual agreement the lease was cancelled and defendant vacated the premises. It is conceded to be the law that parties to a lease may by mutual agreement cancel and surrender the same.

The lease ran from May 1, 1925, to April 30, 1926, at \$110 a month. Defendant vacated the premises October 1, 1925. Plaintiff testified that the apartment was vacant October and November and that she rented the premises in December, 1925, at \$90 a month. Defendant testified that plaintiff charged his wife with running an immoral house and came every two or three days through the house and abused him and his wife and asked them to move out, and kept this up over a month, when they finally agreed the lease should be cancelled if the defendant would pay the rent up to the time he should move; that this was the mutual agreement and that he paid the rent up to October 1, when he moved out. A Mrs. White gave supporting testimony, saying that she was present in the apartment visiting the defendant, and heard the conversation between him and plaintiff; that she heard plaintiff tell defendant she wanted the apartment and wanted him to get out because the neighbors were constantly complaining against him and threatening to move out if she did not get rid of him. Plaintiff categori-

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U. S. DEPARTMENT OF JUSTICE

Indicated by confession for same under a lease for re-
tored against defendant, which was subject to and defendant's prevail-
ted to effect. Upon trial by the court, the finding was against the
defendant and judgment was entered for him.

Defendant's motion that by Mutual Agreement the lease
was cancelled and defendant vacated the premises. It is contended
to be the law that parties to a lease may by Mutual Agreement
cancel the same.

The lease was made on 1, 1930, to April 30, 1930,
at \$110 a month. Defendant vacated the premises October 1, 1930.
Plaintiff testified that the agreement was made October 1, 1930, at
Tomball and that she rented the premises in December, 1930, at
\$90 a month. Defendant testified that plaintiff changed all the
keys to the premises and that she and her husband moved into the
premises and stayed there for three days.
Through the house and stayed there for three days.
move out, and kept this up over a month, when they finally agreed
the lease should be cancelled. The defendant said that she
up to the time she moved out; that she was the tenant.
and that he said she rent up to October 1, when he moved out.
Mrs. White gave conflicting testimony, saying that she was present
in the apartment during the defendant's stay, and that she
told between him and plaintiff that the lease should be cancelled.
Defendant and plaintiff had agreement and wanted to get out of the
the defendant were constantly negotiating against the defendant
ing to work out it all and all of this. Plaintiff testified

cally denied making such statements to the defendant; she denied that she had said that the neighbors had complained about defendant, but on the contrary says that she never had any trouble with defendant or his wife, regarded them as good tenants and did not know why they moved.

A fact tending to give credibility to plaintiff's version is that defendant had occupied the premises since May, 1924, under a lease expiring May, 1925, at which time a new lease was entered into between the parties. It is reasonable to suppose that, if plaintiff had received any complaints of immoral conduct prior to the new lease, she would not have made it. Defendant himself testified that from May, 1924, until August, 1925, he had had no controversy whatever with plaintiff.

The trial court has an opportunity to see and hear the witnesses who have testified in the case and is better able than are we to determine the question of credibility, and the same weight should be given by a court of review to the findings of the court as to the verdict of a jury. Rinehart v. Shedd, 207 Ill. App. 139; Detmer Woolen Co. v. Arthur Dixon Transfer Co., 167 Ill. App. 408; Lidgerwood Mfg. Co. v. S.W.H. Robinson & Son, 198 Ill. App. 604. The verdict of a jury based on conflicting evidence would not be disturbed although not in favor of the party producing the greater number of witnesses. Pixley v. Swail, 194 Ill. App. 151.

Plaintiff's testimony that the premises were vacant in October and November, 1925, and were rented for \$20 a month less for the balance of the term was not contradicted. Defendant's pleadings did not question the amount of the judgment and no objections were made at the trial to the testimony on this point. The amount of the finding was justified by the evidence. We would not be warranted in reversing the judgment, and it is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

only being willing to accept the statement; the fact that he had told the neighbors that he was not, but in the meantime they had not been able to get a statement of his wife, regarding her as good friends and the fact that they moved.

A fact which is very important in this case is that the defendant had changed the premises since 1934, under a lease expiring May, 1935, at which time a new lease was entered into between the parties. It is necessary to know that, if plaintiff had received any knowledge of the fact prior to the new lease, she would not have been in a position to testify that from May, 1934, until August, 1935, he had had no conversation whatever with plaintiff.

The trial court has no authority to set aside the testimony of the witnesses who have testified in the case and in other cases. We are to determine the question of credibility, and the fact that the defendant should be given a credit of two or three years of the court as to the version of a fact, People v. Smith, 193 Ill. App. 132; People v. Smith, 193 Ill. App. 132; People v. Smith, 193 Ill. App. 132; People v. Smith, 193 Ill. App. 132. The version of a fact based on conflicting evidence must not be disturbed although it is based on the early version of the greater number of witnesses. People v. Smith, 193 Ill. App. 132.

Plaintiff's testimony that the premises were rented in October and November, 1935, and were rented for \$20 a month less for the balance of the term was not contradicted. Defendant's witness did not question the amount of the payment and no other facts were made at the trial to the contrary on this point. The amount of the rental was testified by the witness, and it is not to be disturbed in reviewing the judgment, and it is affirmed.

W. H. GRAY and MRS. W. H. GRAY,
Appellees,

vs.

ROSE VICTOR and A. VICTOR,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

256 I.A. 598

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

By this appeal defendants seek the reversal of a judgment entered against them for \$120 upon a directed verdict for the plaintiffs in an action brought against them as guarantors of rental under a lease.

The defense urged is constructive eviction of the tenant in that the basement was flooded with water and the presence of coal gas from the furnace, and that as guarantors the defendants are entitled to all the defenses of the tenant.

The evidence tended to show that plaintiffs leased the premises in question, number 415 Realyn place, Chicago, to be used for a rooming house to Mr. Johnson, whose lease expired April 30, 1928. Johnson desired to sell the rooming house business with the lease to Mrs. Angie Mason and for this purpose showed her the premises. Mrs. Mason testifies that she went through the house and cellar and that the cellar was dry and clean; that she examined the furnace and asked whether there was any coal gas at any time from the furnace. She and Johnson came to terms and his lease was transferred to her and she took possession. The time when this was done is somewhat indefinite, although probably it was in the early part of April. She also executed a lease in her own name with plaintiffs for the term following the expiration of the Johnson lease. The new lease began May 1, 1928, and expired April 30, 1930. At the same time defendants executed a written guaranty which recited

V. E. GALT and EARL A. GALT,
Appellants,

vs.

ROBERT VICTOR and AL VICTOR,
Appellees.

IN SENATE

OF CHICAGO.

2501 A. 388

RECEIVED THE CHIEF OF POLICE
CHICAGO, ILL.

BY THIS SPECIAL DELIVERY MADE THE FOLLOWING:

Important matters arising from the case of Robert Victor and Al Victor in the
the plaintiff in an action brought against them in the court of
Chicago, under a writ.

The defense urged in connection with the trial of the

fact that the defendant was located with the plaintiff at the time
of the trial, and that the plaintiff was located at the time
the trial was held in all the details of the case.

The evidence tended to show that the plaintiff was located at the

premises in question, under the name of Robert Victor, Chicago, in the
for a certain house in the city, and that the plaintiff was located at the

house. The evidence tended to show that the plaintiff was located at the
house of Mrs. Victor and the defendant was located at the

house. The evidence tended to show that the plaintiff was located at the
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that for value received in the sum of \$25, "we hereby guarantee the payment of the Rent and the performance of the covenants by the party of the second part in the within Lease covenanted and agreed, in manner and form as in said Lease provided." Mrs. Mason paid her April rent to Johnson and paid rent for May, June and July to plaintiffs under the new lease. She testifies that early in April, which was during the Johnson lease, the cellar became flooded after a rain storm and it became flooded several times thereafter, and that the house became cold and damp; that it was necessary to keep a fire all the time; that she complained at various times to the agent of plaintiffs about the furnace and water in the cellar. She left the premises September 23, 1928.

The record fails to disclose any evidence as to the condition of the premises at the time she signed the lease from plaintiffs; neither is there any evidence as to the condition of the premises at the time she vacated the same. The lease contained the usual provisions that the tenant has examined the premises and knows the condition thereof and that no representations concerning the same have been made by the lessors and that the lessors shall not be liable for damages occasioned by failure to keep the premises in repair.

To constitute a constructive eviction it has repeatedly been held that the eviction must be by wilful omission of duty or commission of a wrong on the part of the landlord which renders the premises untenable. Barrett v. Boddie, 158 Ill. 479. The landlord cannot be held responsible for conditions not known to him at the time of leasing, unless he has covenanted to repair. Sunaseck v. Morey, 157 Ill. App. 278; 36 C. J. 323. The defendant has the burden of proving a constructive eviction and must show that the conditions complained of were of a grave and permanent character

and deprived the tenant of the beneficial enjoyment of the premises. Risser v. O'Connell, 172 Ill. App. 64.

This case is not like Gibbons v. Hoefeld, 299 Ill. 455, cited by defendants, in which the premises were not ready for occupancy at the beginning of the term, as both parties knew; the tenant then had a right to abandon the premises but was induced not to do so by the promises of the landlord to remedy the defects complained of, and was induced to take possession of the premises. In the instant case there were no promises or representations of any kind. There was no evidence of hidden defects nor evidence that plaintiffs knew or were chargeable with notice that rain would come into the basement nor any evidence as to how the rainfall entered the premises or that the premises were rendered untenable.

We cannot see that there was any question to be submitted to the jury. The judgment was proper and is affirmed.

AFFIRMED.

Katchett and O'Connor, JJ., concur.

and received the benefit of the treatment - 100% of the patients.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the various groups and individuals mentioned in the report. It is therefore necessary to state that the Commission is not in a position to make any definite statement regarding the activities of these groups and individuals.

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JULIUS H. KARQUARDT,
Appellee.

vs.

MORRIS KATZ and ISRAEL LEWIS,
Copartners Doing Business as
KATZ & LEWIS,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

256 I.A. 598²

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from an adverse judgment of \$5,000 entered upon the finding of the court in the trial of an action in assumpsit.

Suit was brought November 9, 1927, upon an alleged oral contract said to have been made February 1, 1923. It will be noted that suit was brought shortly before the statutory limitation of five years had run. Plaintiff says that he was employed by defendants to procure them a contract to furnish labor and material for plumbing work on the Graemere hotel and defendants agreed to pay him \$5,000 for these services. Defendants deny this.

Plaintiff was vice-president of the West Side Trust & Savings Bank, of which defendants had been customers and depositors for many years; he testified that on February 1, 1923, Defendant Morris Katz came to him and asked him to get the defendants a job of plumbing and Katz told plaintiff that he would make it worth while for plaintiff to do this. Plaintiff told him of the job on the Graemere hotel and they figured it would run approximately \$100,000, and defendant Katz told him that he would give him \$5,000 if he procured the job for them. Plaintiff admits that he knew nothing about plumbing work or contracts and that he did not have the plans before him and did not know how large the contract would be at the time of this alleged conversation.

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Aug. 7 - 1908

original contract call to have been made February 1, 1962. It was
be noted that call was made at shortly before the February 1962
statement of five years ago. Plaintiff says that he was employed
by defendant in previous time a contract of five years ago and was
treated for plaintiff with the defendant before and after
ended to see him in 1962 and was very good. Plaintiff says that

At the time of this conversation, he was at the home of his wife and children, who were living in the same house as before. He had been married for about ten years, and had three children, two boys and one girl. The youngest child was born in 1908, and was then about five years old. The other two children were older. He had been working for some time in the same business, and was well known in the community. He had no other relatives living near him.

Katz denied that he made any agreement or promise to pay plaintiff \$5,000 or any other sum in this connection, and testified that Mr. Mayer, then president of the bank, with whom he was very well acquainted, requested plaintiff to assist defendants to get the job on the Gramercy hotel, and that thereupon plaintiff gave Katz a letter introducing him to Mr. Foster of the Shank company, which was the general contractor on the building. Defendants thereafter received the plans, submitted bids and procured the contract for plumbing and heating for the sum of \$105,000. Plaintiff had testified that he was advised that defendants were taking some \$5,000 in bonds under their contract and that he had agreed to accept these bonds from defendants in lieu of cash, and had made repeated demands for the cash or bonds a short time after the contract was entered into. The contract was introduced in evidence and contains no provision with reference to defendants taking any bonds. Katz further testified that subsequently plaintiff left the West Side Trust & Savings Bank but defendants frequently had business dealings with him up to about the year 1927, and that at no time during all that period was any request or demand made upon him by plaintiff in connection with payment under said contract.

This is a case where plaintiff asserts an oral contract, which is categorically denied by defendants. The decision as to which version is correct depends upon the credibility of the witnesses. Under such circumstances the trial court should weigh the probabilities of the respective stories and be liberal in admitting and considering evidence of collateral facts which affect the probabilities one way or another.

It is a matter of common knowledge that customers of a bank constantly seek and take advice from its officials concerning business matters. Such advice is usually given as a matter of good will between the bank and its customers.

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Under the circumstances presented by the case before us we would rather be inclined to believe that this was such an instance, and that defendants never expected to and did not agree to pay plaintiff anything for merely writing a letter of introduction.

We are of opinion that the court excluded competent evidence which would tend to support defendants' version. Defendants offered to show that their profit on the transaction was estimated at \$7,000. If this was the fact, it would throw considerable doubt as to the probability that defendants would pay \$5,000 of this amount to plaintiff. The court held such evidence incompetent. Defendants also offered to show that the defendant Lewis had conversations with the plaintiff and was present at some of the conversations between plaintiff and Katz and offered to show that at none of these conversations was there anything said about any obligation to pay plaintiff anything. Such evidence should have been admitted and considered. The law is, that whenever there is a conflict in the evidence relevant to the issue, evidence of collateral facts, which have a direct tendency to show that the evidence of the one side is more reasonable and therefore more credible than that of the opposite side, is admissible. Standard Brewery v. Healy, 209 Ill. App. 272, and cases there cited. As was said in that case, "it would be a narrow rule that would limit the evidence to an affirmation of the agreement on the one hand, and a denial of it on the other."

For the errors in excluding competent evidence as indicated, the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Witchett and O'Connor, JJ., concur.

33837

LOUISE AUGUSTIN, for Use of
SAMUEL B. HILL,
Appellees,

vs.

THOMAS J. BASSLER et al.,
Garnishees.

WILLIAM J. McGAH, Intervening
Petitioner,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

256 I.A. 598³

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the intervening petitioner, William J. McGah, from a judgment for plaintiff for \$500 in a garnishment proceeding. Samuel B. Hill, beneficial plaintiff, had judgment against Louise Augustin upon her judgment note given him in payment of attorneys' fees for services rendered. He commenced a garnishment suit based upon this judgment against Bassler, Bippus, Rose and Burt, attorneys at law, as garnishees. They appeared, admitting the possession of moneys belonging to Louise Augustin, and were dismissed. The court heard the opposing claims of the plaintiff, Hill, and of the intervening petitioner and decided in favor of the plaintiff and judgment was entered accordingly.

Most of the argument and points presented by the briefs are concerned with the question as to whether Hill was entitled to an attorney's lien on the fund in the hands of the garnishees. However, we do not think it necessary to decide this, for it would be conceded that, in the absence of any claim by the intervening petitioner, Hill would be entitled to judgment in the garnishment proceeding. The case, therefore, must be determined upon the showing made by the intervening petitioner in seeking to establish his right to the fund in the hands of the garnishees.

Apparently an intervening petition was filed and plaintiff filed an answer. This made up an issue of fact to be tried by the court. The abstract gives us no information as to the basis of

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WILLIAM J. BOWEN, Intervenor,
Petitioner,

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—Maine Soc. Natl. Antiquities, 1894, p. 100, as *glacialis*.

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The district court, the court.

petitioner's claim, nor anything with reference to the answer thereto, so that we cannot tell from an inspection of the abstract what issue was presented to the trial court with reference to the intervening petition. It is a well established rule that an abstract must show matters relied on for reversal. The reviewing court will not examine the record to find grounds for reversing. Deterding v. Central Illinois Public Service Co., 223 Ill. App. 374; Barber v. Mellish-Maynard Co., 209 Ill. App. 299; Shreffler v. Fuller, 208 Ill. App. 630.

We gather that the intervenor claimed under an alleged assignment of the fund made by Louise Augustin. If this was the basis of his claim, it was necessary for him to prove the same. Section 18, chapter 110, Illinois Statutes, provides that the assignee of any chose in action may sue thereon in his own name and "shall in his pleading on oath, or by his affidavit where pleading is not required, allege that he is the actual bona fide owner thereof, and set forth how and when he acquired title." This placed upon the intervenor the burden of alleging and proving the facts required by the statute. Oberman v. Camden Fire Ins. Assoc., 314 Ill. 264; Madison-Kedzie State Bank v. Old Reliable Motor Truck Co., 236 Ill. App. 442. Considering the intervening petition contained in the record, we are of opinion that it is wholly insufficient as not complying with the statute.

We do not find the alleged assignment in either the abstract or in the record. The bill of exceptions contains no proof of the same and there was no attempt to prove it.

Under such circumstances the trial court would have been justified in finding against the claim of the intervenor. If the judgment on the record is proper it will be affirmed. On the record the judgment was proper and it is affirmed.

AFFIRMED.

Hatchett and O'Connor, JJ., concur.

Bellevue's claim, not only with reference to the matter before
 so that we cannot tell from an inspection of the evidence what is
 not was presented to the trial court with reference to the inter-
 vening petition. It is a well established rule that an interven-
 ing party must show that his interest in the subject matter is
 not adverse to the rights of the parties to the litigation. Bellevue v. Central Illinois Public Service Co., 253 Ill. App. 374; Bellevue v. Central Illinois Public Service Co., 253 Ill. App. 374; Bellevue v. Central Illinois Public Service Co., 253 Ill. App. 374.

We further find that the intervenor claimed notice to be served
 assignment of the land made by Louis Bellevue. It is not the
 basis of his claim, it was necessary for him to prove the same.
 Section 18, Chapter 111, Illinois Statutes, provides that the ad-
 vantage of any object in action may not be taken by the owner and
 "shall in his pleading be set forth, or by his affidavit where pleading
 is not required, affirm that he is the owner of the land in dispute."
 and set forth how and when he acquired title." This record upon the
 intervenor the burden of showing and proving the facts required by
 the statute. Bellevue v. Central Illinois Public Service Co., 253 Ill. App. 374.
Bellevue v. Central Illinois Public Service Co., 253 Ill. App. 374.
 As to the intervenor's claim that he was owner and in the
 record, we are of opinion that it is wholly insufficient to set com-
 plete with the statute.

We do not find any alleged assignment in either the ab-
 stract or to the record. The bill of exceptions contains no error
 of the record and there is no assignment of error.
 Under these circumstances the trial court would have
 been justified in finding against the claim in the intervenor. If
 the judgment on the record is proper it will be affirmed. No new
 record the judgment was proper and it is affirmed.

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

FORD LEE WASHINGTON and JOHN W.
SUBLETT,
Plaintiffs in Error.

29
ERROR TO MUNICIPAL COURT
OF CHICAGO.

256 I.A. 598⁴

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

By this writ of error defendants seek the reversal of an order finding them in contempt of court and sentencing them to serve six months in the county jail.

The order finding them in contempt arose out of a civil proceeding in which Mishkin and Mishkin were plaintiffs and Nat Nazarro and Nat Nazarro, Inc., were defendants. The defendants here, Washington and Sublett, were garnishees and filed an answer stating that at the time of the filing of the answer they were not indebted to Nat Nazarro or Nat Nazarro, Inc., in any sum whatever and had no money, choses in action or effects belonging to them or in which they were interested. Subsequently on hearing the issues were found against the garnishees and judgment entered against them for the amount of \$1100, the court finding that they were indebted to Nat Nazarro and Nat Nazarro, Inc., in this sum. Thereafter Mishkin and Mishkin filed an affidavit and sought a rule on the defendants, Washington and Sublett, to show cause why they should not be held in contempt of court. The affidavit alleged that at the time of the service of the garnishment writ and the filing of the answer thereto by the garnishees, the garnishees did have money, choses in action, credits and effects owned by or due to Nat Nazarro or Nat Nazarro, Inc., and that the answer of the garnishees was wilfully, falsely and corruptly sworn to and "thereby said Washington and Sublett committed a contempt of this

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rule in the public records of the county of Cook.

they should not be held in evidence in court. The following is

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"The copy of the original is in the public records of the county of Cook."

Honorable Court." Subsequently the court entered an order, apparently based on this affidavit alone, finding them guilty of contempt in making and filing an untrue answer under oath and sentenced them to confinement in the county jail for six months.

We are referred to no case and know of none which authorizes a trial judge to institute contempt proceedings against a garnishee because of filing a false answer. Section 25 of the Garnishment act, chapter 62, provides for an attachment and punishment as for contempt if any garnishee "refuses to neglects to deliver any goods, chattels, choses in action or effects in his hands when thereto lawfully required by the court or justice of the peace or officer having an execution upon which the same may be received." This does not authorize contempt proceedings where the garnishee by his answer denies that he has possession of any goods or chattels belonging to the defendant. If the garnishee^{answers}/falsely, he may be bound over to the grand jury and indicted for perjury. In Franheim v. Miller, 241 Ill. App. 328, we held that the statute authorizes the court to punish a garnishee for contempt only when the garnishee refuses to turn over property in its possession, and does not give authority to the court to punish as for contempt unless it appears that the garnishee has property in its possession belonging to the defendant and refuses to deliver possession of the same. In People v. Stone, 181 Ill. App. 475, and in People v. Berrell, 216 Ill. App. 341, the defendants were found in contempt for swearing falsely before the court. In both cases it was held that the court had no authority to enter the order.

The order was also faulty in that it failed to set out the facts constituting the offense so fully and certainly as to show that the court was authorized to make the order. People v. Hogan, 256 Ill. 496.

In the case before us the defendant complains of many

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irregularities which it is not necessary to note, as we hold that the finding and judgment against the garnishee cannot be made the basis of a contempt proceeding because of the alleged false statements in the answer.

The judgment is reversed.

REVERSED.

Matchett and O'Connor, JJ., concur.

investigation which is in not necessary to state, as we have said, that the thing we found against the defendant would be with the facts of a technical proceeding because of the alleged lower state-

ments in the law.

The judgment is reversed.

Reversed.

Reversed and O'Connor, 77, dissent.

CARROLL, SCHENDORF & BONNICKS, Inc.,
Defendant in Error,

vs.

ALFRED C. BORROFF,
Plaintiff in Error.

ERROR TO THE MUNICIPAL
COURT OF CHICAGO.

256 I.A. 599

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, a licensed real estate broker in Chicago, brought suit to recover a real estate commission alleged to have been earned in finding a purchaser ready, willing and able to purchase defendant's property on his terms. Upon trial the jury returned a verdict against defendant for \$500. From the judgment thereon he seeks a reversal.

Considering the somewhat variant testimony, the jury could properly believe that William McCabe, employed by plaintiff, called on the defendant and inquired if he desired to sell his property at 6505 Kenwood avenue and, if so, plaintiff would list it for him and that the commission would be 3%. Defendant told McCabe that plaintiff could list it for sale at a price of \$25,500 on terms of \$10,000 cash and the balance in reasonable deferred payments, and that defendant would pay plaintiff a commission of 3% on such sale. Later McCabe with Mr. Leigh, also connected with plaintiff, called on defendant with a contract for \$23,500, which defendant refused to sign, saying that his price was \$25,500, as he had stated in a previous conversation. Thereafter plaintiff procured Arthur E. Lanski as a purchaser for \$25,500, \$10,000 cash and \$15,500 on deferred payments, which was the price and terms fixed by defendant. Lanski gave plaintiff \$1,000 earnest money and was amply able to purchase the property, owning several pieces of real estate in the city of Chicago; on one of his buildings the equity was estimated to be worth \$130,000 and on another his equity was placed at \$180,000.

DEPARTMENT OF JUSTICE
WASHINGTON, D.C.

RE:

ALFRED P. SLOAN, JR.
Defendant in Error.

25614.399

ALFRED P. SLOAN, JR.
Defendant in Error.

Plaintiff, a licensed real estate broker in Chicago,

brings suit to recover a real estate commission alleged to have been earned in selling a business tract, siting and sold to one Chase Edwards's property in his name. From time to time the tract turned a verified unpaid defendant for \$100,000. From the judgment thereon he seeks a reversal.

Conceding the somewhat relevant testimony, the jury

could properly believe that William Edwards, employed by plaintiff,

called on the defendant and inquired if he desired to sell his

property at 5505 Leavitt Avenue and, if so, plaintiff would list it

for him and that the commission would be 5%. Defendant told Edwards

that plaintiff would list it for sale at a price of \$25,000 or more

of \$10,000 cash and the balance in ten monthly deferred payments, and

that defendant would pay plaintiff a commission of 5% on each sale.

Later Edwards with Mr. Taylor, then connected with plaintiff, called

on defendant with a contract for \$25,000, which defendant refused to

sign, saying that his price was \$25,000, as he had stated in a previous

conversation. Thereafter plaintiff procured from Mr. Taylor

as a purchaser for \$25,000, \$10,000 cash and \$15,000 on deferred

payments, which was the price and terms fixed by defendant. Plaintiff

gave plaintiff \$1,000 earnest money and was ready and able to purchase

the property, owing several thousand of real estate in the city of

Chicago; as he is a real estate broker the equity was estimated to be

worth \$120,000 and on another his equity was placed at \$120,000.

Defendant declined to enter into the contract and then stated that his price was \$25,000 net cash. Lanaki then offered to pay \$25,500 cash. Plaintiff wrote to defendant submitting this proposition and offered, if the deal went through, to reduce its commission from 3% to \$500. Defendant refused to carry out this agreement but gave no reason for doing so.

The facts in evidence bring the case within the rule that a real estate broker is entitled to his commission, if he secures a purchaser ready, willing and able to purchase the property on the terms of the seller. Schultz v. Mehan, 133 Ill. App. 491; Lang v. Hand, 57 Ill. App. 134; Smith v. Keeler, 51 Ill. App. 267; Carter v. Simpson, 130 Ill. App. 323.

Defendant in a 72 page brief discusses the evidence in great detail, with copious quotations from decided cases. We have considered the points made but do not hold that any of them requires a reversal of the judgment. To comment upon them all would unduly lengthen this opinion. We cannot say that the verdict of the jury was manifestly against the weight of the evidence, and as there were no reversible errors upon the trial the judgment is affirmed.

AFFIRMED.

Katchett and O'Connor, JJ., concur.

33962

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,
vs.

CHIN BING,
Plaintiff in Error.

3 / a
ERROR TO MUNICIPAL COURT
OF CHICAGO.

256 I.A. 599²

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Defendant was found guilty in the Municipal court of Chicago of carrying concealed a deadly weapon and sentenced to the House of Correction for one year and fined one dollar. By this writ of error he seeks the reversal of this judgment.

In defendant's brief a number of points are raised which we do not consider meritorious with one or possibly two exceptions. We are inclined to think that defendant did not have full opportunity to present his defense, if any, upon the trial.

The information was sworn to August 8th and the trial was held the same day. The record shows that at the trial defendant was not represented by counsel; that he had been in this country only two years, could speak broken English to some extent, and was interrogated by the court through an interpreter who seems to have been a bystander. Defendant denied that he had a gun on his person.

It was held in The People v. Kowalski, 332 Ill. 167, that a person accused of crime should be given full opportunity to place the court in possession of all facts bearing on the question of the guilt or innocence of the accused. Properly to do this, defendant should have been represented by counsel, and the case is remanded for another trial.

Upon the next trial any question as to proof of the proper venue can be avoided.

REVERSED AND REMANDED.

Matchett and O'Connor, JJ., concur.

UNITED STATES OF AMERICA
DISTRICT OF COLUMBIA

vs.

JOHN W. ...
... in ...

JOHN W. ...
... CHARGE.

2261A. 399

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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J. BARATT,
Appellee,

vs.

JOHN D'AMORE and MRS.
STELLA D'AMORE,
Appellants.

32
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

256 I.A. 599³

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Defendants filed their petition August 1, 1929, under Section 89 of the Practice act, asking for the vacation of a judgment entered against them December 5, 1927. Their motion was denied and they appeal.

The petition alleges that John D'Amore, one of the defendants, had at no time knowledge of the pendency of the original case against him and did not hire or retain an attorney in his behalf and had no opportunity to appear in court and present his defense; that the co-defendant, his wife, was found insane by the County court of Cook county February 1, 1922, and was restored to sanity February 9, 1926, and that during the time she was insane she had been the victim of schemers and other unscrupulous parties and that John D'Amore had considerable trouble in keeping her in seclusion. The petitioner alleges that at no time had he any transactions with the plaintiff and that while he had no knowledge of how the conspiracy was concocted he was positive that at no time was he served with summons or acquainted with the pendency of the suit; that while he does not charge the deputy bailiff with connection with the conspiracy or plot, it may be that the conspirators or plotters had served some other person complacent enough or wicked enough to impersonate the petitioner. He requested that he be given the opportunity of offering proof showing the truth of his allegations.

The original suit was commenced against John D'Amore

May 14, 1925. Summons was issued and served on May 16, 1925, as shown by the return of the deputy bailiff. May 25th the appearance of John D'Armore by Harry Z. Perel, an attorney at law, was entered. May 26th, on motion of defendant, the time for filing an affidavit of merits was extended. May 28th, on defendant's motion, plaintiff was ordered to file a more specific statement of claim and defendant's time to file an affidavit of merits was extended. June 15th an amended statement of claim was filed alleging that plaintiff claimed for goods and merchandise sold and delivered to defendant. The statement is itemized and shows that the merchandise was dry goods, such as sheets, pillow cases, curtains, also women's and men's garments. The total bill was \$1129.05, on which payments had been made on account, leaving a balance due of \$311.75.

June 18th an affidavit of merits was filed, in which defendant denied that he bought the goods or merchandise. October 7th leave was given to make Mrs. Stella D'Armore a co-defendant, and April 27, 1927, her appearance was filed by Harry Z. and B. Perel. December 5th the cause came on for hearing and the record recites that the parties were present. The court found the issues against the defendants. Defendants moved the court for a new trial, which motion was overruled. They moved in arrest of judgment, which was overruled, and it was held that plaintiff should have judgment in the amount of \$311.75. Defendants prayed an appeal, which was allowed on condition of filing a bond within thirty days and a bill of exceptions within sixty days. December 8th defendants moved the court to vacate the judgment, which motion was heard December 10th and overruled. The next move was the filing of the instant petition on August 1, 1929.

It is the established law that under Section 69 of the Practice act, which is substituted for the writ of error coram nobis, the return on a summons cannot be contradicted; that the parties to

a suit at law are conclusively bound by the return after the term of court in which the judgment was entered. Chapman v. North American Life Insurance Co., 292 Ill. 179.

The allegations of a conspiracy in the petition are too vague and uncertain to call for any action by the court. Furthermore, such petition must show that the entry of the judgment sought to be vacated was not caused by any negligence on the part of the petitioner. American Surety Co. v. Elias, 214 Ill. App. 463. No such showing was made. It should be noticed that the petitioner admits in his petition that he was called as a witness, but the case was continued; that he was not informed that the case was against him, although he was interrogated by the attorneys as to whether he had had any transactions with the plaintiff, Jacob Baratt. The clear inference is that defendant had knowledge of the case but took no steps in the matter until long after judgment was entered.

Petitioner correctly says that his motion under Section 89 of the Practice act is the beginning of a new suit, but argues that its sufficiency must be raised by demurrer or plea or by motion to dismiss or in some way making an issue of fact. While this is undoubtedly the better practice, yet we know of no case holding that, where on its face the petition appears to be insufficient and the court denies the motion made thereunder, a court of review must reverse because the plaintiff filed no written pleadings. Such a rule would be unreasonable. The record shows that all the parties were present at the hearing of the petition and it is apparent that the court treated the matter as if a demurrer to the petition had been filed.

The order denying the motion to vacate the judgment was proper and is affirmed.

Plaintiff asks for an assessment of a penalty of ten per cent of the amount of the judgment on the ground that this

a suit at law was conclusively barred by the statute which the court

of error in which the judgment was reversed. Thompson v. Smith

100 Ill. 112.

The allegations of a conspiracy in the petition are

too vague and uncertain to call for any action by the court.

Furthermore, some petition must show that the injury of the plaintiff

went beyond to be sustained was not caused by any negligence on the

part of the defendant. Thompson v. Smith, 100 Ill. 112.

App. 103. In such a case, it should be noted that the

petitioner states in his petition that he was injured in a business,

but the case was dismissed; that he has not followed that the case

was against him, although he was indemnified by the defendant as

to which he had had any conversation with the defendant, Jacob

Barrett. The clear inference is that defendant had knowledge of the

case but took no steps in the matter until after defendant was

dismissed.

Petitioner certainly says that defendant was injured

as of the practice and in the beginning of a new suit, but suppose

that the sufficiency must be raised by the court or given by motion

to dismiss or in some way making an issue of fact. This is in

undoubtedly the better practice, yet we know of no case holding

that, where on the face the petition appears to be insufficient

and the court denies the motion, that defendant is entitled to a writ of review

must reverse because the plaintiff filed no written statement. Such

a rule would be unreasonable. The court says that in the petition

were present at the hearing of the petition and it is apparent that

the court treated the matter as if it were a petition for the petition had

been filed.

The other branch of the case is whether the judgment

was proper and is affirmed.

Plaintiff asks for an assessment of a penalty of ten

per cent of the amount of the judgment on the ground that the

appeal was prosecuted for delay. We find no authority in the statute for such a penalty. Section 23, chapter 33, Costs, permits the assessment of a penalty where a judgment is affirmed and the appeal is prosecuted for delay. We are not affirming the original judgment, only the order denying the motion to vacate.

For the reasons indicated the order appealed from is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

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33679

OSCAR H. CARLSON & SONS, Inc.,
For Use of Eugene Hedges,
Appellee,

vs.

WALTER G. KAHLER, Garnishee,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

256 I.A. 399⁴

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

November 30, 1928, Eugene Hedges obtained a judgment for \$729.26 against Oscar H. Carlson & Sons, Inc. Hedges brought garnishment proceedings on the judgment and summoned Walter G. Kehler as garnishee. Kehler was served with summons on February 11, 1929, and thereafter filed an answer on February 25th and an amended answer on April 2nd. Upon this amended answer the court on motion of Hedges entered a finding and judgment against the garnishee in the sum of \$729.26, the amount of the original judgment. That judgment the garnishee seeks to reverse upon this appeal.

The sole question to be determined is whether on the answers as filed Kehler is liable for the amount of the judgment.

The answer avers that on the date of service and at the time of filing the answer the garnishee was not indebted and had no moneys, credits, etc., of any kind belonging to the judgment debtor. In particular, it avers that on November 6th and 10th, 1928, Kehler made contracts with the judgment debtor whereby it agreed to furnish material and perform work on certain buildings about to be erected for the garnishee. The work was to be done and the material furnished according to drawings and plans of an architect. Payment was to be made upon the certificates of the architect as the work progressed. Under one contract the garnishee agreed to pay \$3477 and under the other \$178. The garnishee made no further payments to the judgment debtor after the service of the writ, but after the writ was served and before the filing of the final answer, he paid certain sums to various material men for

OSCAR W. LARSEN & SONS, INC.,
101 and 103 Avenue C,
Brooklyn,
New York.

RE:

WILLIAM S. LARSEN, Plaintiff,
vs.
OSCAR W. LARSEN & SONS, INC.,
Defendant.

250 A. 100

1. THE COURT HEREBY GRANTS THE VERDICT OF THE JURY.

February 20, 1925, the jury returned a verdict

for \$750.00 against Oscar W. Larsen & Sons, Inc., the defendant.

Plaintiff's motion for judgment and removal failed.

Plaintiff's motion for judgment and removal failed.

Plaintiff's motion for judgment and removal failed.

Plaintiff's motion for judgment and removal failed.

Plaintiff's motion for judgment and removal failed.

Plaintiff's motion for judgment and removal failed.

Plaintiff's motion for judgment and removal failed.

The jury returned a verdict for the plaintiff on the

issue of liability in the sum of \$750.00.

The amount awarded shall be the full amount of the

sum of \$750.00 and the costs of the action.

Plaintiff's motion for judgment and removal failed.

Plaintiff's motion for judgment and removal failed.

Plaintiff's motion for judgment and removal failed.

Plaintiff's motion for judgment and removal failed.

Plaintiff's motion for judgment and removal failed.

Plaintiff's motion for judgment and removal failed.

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Plaintiff's motion for judgment and removal failed.

Plaintiff's motion for judgment and removal failed.

which certificates were issued prior to the time of service, and he advanced other sums to meet the payroll, from time to time. The items upon which payments were made are enumerated in the answer and will not be repeated here further than to state that the total sum of such payments exceeded the amount for which judgment was entered. The answer states that it was necessary to make these payments in order to prevent the parties to whom the payments were made from filing liens against the real estate.

The decisions seem to hold the law to be that a garnishee under such circumstances makes such payments at his peril, and that a payment of this kind ^{is taken} to be an admission on his part that he was indebted to the judgment debtor to the amount paid at the time the writ was served. The leading case so holding is Wilcus v. Kling, 87 Ill. 107. That case has been followed in Green v. Johnson, 151 Ill. App. 63; Western Valve Co. v. Quay-Dakin Co., 177 Ill. App. 548; Mueller v. Kroll, 207 Ill. App. 308, and in Paisley v. Park Fireproof Storage Co., 222 Ill. App. 96. These decisions go upon the ground that upon the service of a writ the garnishee must submit the fund to the jurisdiction of the court, and that he may not himself act arbitrarily in deciding to whom it shall be paid.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

HARVEY L. CAVENDER and WILLIAM
E. KAISER, Copartners as
Cavender and Kaiser,
Defendants in Error,

vs.

MARGARET SCHREIBER and JULIUS
BECKER,
Plaintiffs in Error.

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

256 I.A. 600¹

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Harvey L. Cavender and William E. Kaiser recovered two judgments against Julius Becker. Executions issued and were returned unsatisfied. Cavender and Kaiser then filed a creditor's bill against Becker and Margaret Schreiber. The proceeding was under section 49 of the Chancery act (see Smith-Hurd's Ill. Rev. Stat. 1929, chap. 22, sec. 49, p. 268.)

The bill averred that property belonging to Becker had been transferred to defendant Schreiber and prayed that this be applied to the satisfaction of the judgment. Interrogatories were submitted and answer under oath by defendants demanded.

Becker answered but not under oath. The answer was stricken and his default taken and entered of record. Margaret Schreiber answered denying the allegations of the bill.

The record brought to this court is per praecepe and includes only the summons, bill of complaint, appearance of defendants, answers, decree, together with certain orders entered in the cause. The decree recites the default of one defendant and the answer of the other and states that witnesses were heard in open court.

It is argued by defendants who seek to reverse the decree that no replication was filed; that the case was therefore not at issue and that a motion made by defendants at ^a subsequent term to set aside the decree should have been granted for that reason. So far as this record discloses, the parties went to trial without filing a replication, and the replication was therefore waived.

NAVY L. GAVANES and WILLIAM L. GAVANES, Defendants vs. WILLIAM L. GAVANES and WILLIAM L. GAVANES, Plaintiffs

vs.

NAVY L. GAVANES and WILLIAM L. GAVANES, Defendants vs. WILLIAM L. GAVANES and WILLIAM L. GAVANES, Plaintiffs

NAVY L. GAVANES and WILLIAM L. GAVANES, Defendants

vs. WILLIAM L. GAVANES and WILLIAM L. GAVANES, Plaintiffs

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NAVY L. GAVANES and WILLIAM L. GAVANES, Defendants

vs. WILLIAM L. GAVANES and WILLIAM L. GAVANES, Plaintiffs

NAVY L. GAVANES and WILLIAM L. GAVANES, Defendants vs. WILLIAM L. GAVANES and WILLIAM L. GAVANES, Plaintiffs

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NAVY L. GAVANES and WILLIAM L. GAVANES, Defendants

vs. WILLIAM L. GAVANES and WILLIAM L. GAVANES, Plaintiffs

Miller v. Miller, 210 Ill. App. 67; Piot v. Davis, 147 Ill. App. 203; Marpel v. Scott, 41 Ill. 50.

The answer of Becker not having been sworn to and the answer under oath not having been waived by complainants, the order to strike was properly entered. Neal v. Odle, 308 Ill. 469.

It is also urged that the decree is not supported by the findings of fact. The decree finds the recovery of the judgments against Becker in the Municipal court on April 9, 1926, and in the Appellate court on May 9, 1927; that the executions issued thereon were returned wholly unsatisfied; that the bill was not filed in collusion with Becker or any other person; that during the year 1922 Becker entered into a contract for the purchase of real estate in Cook county, described as lot 5 in block 4; that Becker at that time requested Cavender to take title to this real estate in his name for the use of Becker, and that it was so taken by Cavender at Becker's request; "that on about the 6th day of November, 1922, for the purpose of protecting said Julius Becker, the said Harvey L. Cavender executed two (2) certain quit-claim deeds for said real estate hereinabove described, in one of which said deeds the name of Julius Becker was inserted as grantee, and the other quit-claim deed was executed with the name of the grantee in blank; that thereafter the said Julius Becker, without the knowledge or consent of said Harvey L. Cavender, inserted in said last above mentioned deed the name of the defendant, Margaret Schreiber, and on about the 8th day of January, A. D. 1924, caused said quit-claim deed to be recorded in the Recorder's office of Cook County, Illinois;" that on about February 1, 1923, Cavender paid on account of mortgages then due upon said real estate \$507.50, which sum was advanced by Becker, and that "the down payment upon said property" was advanced by Becker and no part of the payments made was advanced by Margaret Schreiber; that on about January 12, 1923, Becker entered into a contract for

the purchase of real estate described as lots 12 and 13 in block 4, etc., in Cook County, Illinois; that the consideration for the purchase of said lots was paid by Becker and that thereafter on about July 17, 1923, Becker paid an additional sum of \$515.08 on account of the purchase of said lots; that on about June 9, 1925, Becker executed a quit-claim deed, conveying this property to one Alma K. Campe; that this deed was recorded; that thereafter on June 9, 1925, Alma K. Campe executed a warranty deed conveying said lots to Margaret Schreiber, and that this deed was also recorded; that Margaret Schreiber during the years 1922 and 1923 was employed by Becker; that she had actual knowledge of the claim of complainants; that the pretended conveyance and recording of these deeds were made by Becker with the intent to hinder, delay and defraud complainants in the collection of their claim and judgment against Becker, and that Schreiber at the time of recording the deeds knew of this intent on the part of Becker; that the deeds so recorded should be set aside and declared null and void as against the claim or lien of complainants; that \$748.27, together with costs of suit, was due to complainants, and that the judgments are a first and valid lien upon the real estate, subject only to the balance due upon mortgages, trust deeds or valid liens; that Becker and Schreiber has no right or claim of homestead against the lien of complainants upon this real estate, and that if the real estate was sold to satisfy the claim of complainants, the sale should be free and clear of any such claim of homestead; that all of the material allegations in complainant's bill of complaint have been proved by competent evidence, save and except that the complainants are not entitled to any relief as to a lot described as lot 4.

It was therefore ordered, adjudged and decreed that the deeds be set aside and decreed to be of no force and effect as against the judgments of complainants, and that unless the amount found due was paid, together with interest and costs, the clerk of

the court should issue an execution for the amount found due, with costs, and levy upon and sell the real estate to satisfy said amount, and that the sale when made should be free and clear of any right, title, interest or claim of Becker and Schreiber, save and except their right to redeem.

It is claimed that the facts found are insufficient because there is no finding that Becker was insolvent at the time of the alleged fraudulent conveyance, and Bank of Clinton v. Barnett, 250 Ill. 312, is cited to this point. That case is distinguishable, however, in that it is one where the defendant took by gift without intention to defraud, while in this case the finding is that defendant Schreiber took the title with knowledge of the rights of complainants and for the purpose of assisting to defraud them. The return of the executions unsatisfied would also seem to be sufficient prima facie to show the insolvency of Becker. Diamond v. Rogers, 203 Ill. 464.

It is also contended that the findings are defective in that they fail to show affirmatively that the sworn answer of defendant Schreiber was overcome by more than one witness. No cases are cited to this point, and where, as here, the decree shows that the cause was heard by a chancellor upon the testimony of witnesses taken in open court, we think any such finding quite unnecessary. While a better decree might have been drawn, we think the findings of fact are sufficient to show that Margaret Schreiber took title and is holding title to property which in equity belongs to Becker and which should be subjected to the payment of his debts.

Defendants contend that complainants are not entitled to recover because of the finding that one of the complainants had at one time took title to lots 4 and 5 "for the purpose of protecting Becker." It is urged that this shows a participation by one of the complainants in a fraudulent conveyance which would preclude his

the court should leave an examination for the amount of the fine, which
could, and very soon will, tell the real estate to entirely safe means,
and that the wife should be free and clear of any right,
title, interest or claim of Becker and defendant, save and except
their right to recover.

It is claimed that the facts found are inconsistent
because there is no finding that Becker was insolvent at the time
of the alleged fraudulent conveyance, and Becker v. Becker,
100 Ill. 412, is cited to this effect. That case is also
inapplicable, however, in that it is one where the defendant took
by gift without intention to defraud, while in this case the find-
ing is that defendant transferred back the title when he had the
the rights of a wife and for the purpose of assisting in
defraud them. The result of the execution mentioned would also
have to be sufficient and right to show the insolvency of Becker.
Becker v. Becker, 100 Ill. 412.

It is also contended that the findings are defective
in that they fail to show affirmatively that the same amount of
defendant Becker was overcome by more than one witness. It
cannot be said to this point, and more, is here, the finding shows
that the same was done by a consideration upon the testimony of
witnesses taken in open court, or think any such finding valid ne-
cessary. While a better record might have been given, we think
the finding of fact are sufficient to show that defendant transferred
back title and is holding title in property and in equity belongs
to Becker and which should be returned to the payment of his claim.
Defendant cannot claim compensation for the same unless
to recover because at the finding that one of the defendants had
at one time took title to job 4 and 5 for the purpose of converting
them. It is urged that this shows a participation by one of the
defendants in a fraudulent conveyance which would prevent the

recovery in equity, citing Tyler v. Tyler, 126 Ill. 525. The decree, however, does not find that any of the actions of Cavender were with a fraudulent intent, nor are facts disclosed sufficient to establish fraud on his part. Fraud is not presumed.

For the reasons indicated the decree of the Circuit court will be affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

For the reasons indicated the degree of the dilution
should still be adjusted.

33892

THE AD-LEX COMPANY, a
Corporation, Appellee,

vs.

CHICAGO, INDIANAPOLIS &
LOUISVILLE RAILWAY, a
Corporation, Appellant.

35a
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

256 I.A. 600²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff's statement of claim alleged that it shipped certain balls of gum from Jacksonville, Florida, to Chicago; that defendant was a connecting carrier from Louisville, Kentucky, to Chicago, and that defendant failed to carry same without loss or damage.

The affidavit of merits denied that the shipment was in good condition when received by defendant and denied that the goods were damaged while in defendant's possession.

The issues were tried by the court. There was a finding for plaintiff and judgment thereon for \$243, which defendant seeks to reverse by this appeal.

Defendant contends that the evidence fails to show that the gum was in good condition when delivered to defendant. He further says that the damage was due to plaintiff's negligence.

Many authorities are cited sustaining propositions of law which are not questioned, but the controlling questions in the case seem to involve issues of fact. Defendant says, citing authorities, that the burden of proof was on plaintiff to show that the gum was in good condition when delivered to defendant. There is no doubt of the necessity of such proof, and we think there is evidence in the record from which the court could well find that necessary fact.

It appears from the evidence that on March 11, 1926, the A. & N. Candy Company at Jacksonville, Florida, delivered to the Georgia, Southern & Florida Railway Company at that place certain

crates of gum balls and gum machines consigned to plaintiff at Chicago, Illinois. The carrier issued therefor a uniform straight bill of lading which stated that it had received "The property below in apparent good order, except as noted. (Contents and condition of contents of packages unknown.)" There were no exceptions noted. The shipment moved and was delivered to defendant carrier at Louisville, Kentucky, and by it transported to Chicago, where it arrived on April 5, 1926, delivery being made to the Arthur Dixon Transfer Company by order of plaintiff at 10:30 a. m. on that date, at the local freight office of the carrier at 830 Federal street. On that afternoon the shipment was delivered to plaintiff's place of business at 825 South Wabash avenue. Plaintiff introduced the monthly weather report of the United States Government for the month of April, 1926, which showed that on April 5, 1926, there was no rain after eight o'clock a. m.

The evidence also tends to show that these balls of gum and gum machines had been shipped from Chicago to the A. & H. Candy Company in the preceding October; that prior to shipment the gum was examined and found to be in good condition; that a portion of the shipment was opened after its arrival at Jacksonville, Florida, and that the gum then examined was found to be in good condition; that the remaining portion of the shipment was stored in the rear of a bakery and in a storeroom which was not exposed to dampness or moisture; that about a month before the return of the shipment, customers of the Candy Company requested additional cartons of gum and that the refills were taken out of this storeroom and found to be in good condition.

There is expert evidence tending to show that the balls of gum would naturally remain in good condition from six to ten months, and direct evidence that the cartons of gum when re-packed at Jacksonville were in good condition; that they were sent

to the carrier by a drayman who had a closed truck with a top on it, and that it was not raining when the same were sent.

The evidence also tends to show that the cartons when examined at plaintiff's place of business on April 7th showed injury from water.

We think this evidence was prima facie sufficient to show that the goods were in good condition when delivered to the first carrier at Jacksonville, and that fact being proved there was a presumption that the goods remained in the same condition upon delivery to defendant as a succeeding carrier. New York Central R. R. Co. v. Lehigh Stone Co., 220 Ill. App. 563; 10 Corpus Juris, 556. Defendant offered no evidence tending to overcome this presumption.

Defendant cites Marshaw v. Ill. Cent. R. R. Co., 252 Ill. App. 253, a case where judgment for plaintiff shipper was reversed for errors in the instructions, and where the defendant offered affirmative evidence that bags of seeds had been damaged in an ocean voyage prior to delivery of same to defendant carrier. There is no such evidence here. Defendant also cites House v. Wheelock, 254 Ill. App. 149, which, unlike this case, involved an intrastate shipment. The court in that opinion points out that section 23 of the Uniform Bills of Lading act, chap. 27, par. 24, Smith-Hurd's Ill. Rev. Statutes 1929, was controlling there, while an interstate shipment is controlled by section 20 of the Interstate Commerce act.

The law applicable to the present shipment is set forth in Lino v. Northwestern Pacific R.R.Co., 246 Ill. App.451, and other cases construing said section 20.

It is not argued that the finding of the court is against the manifest weight of the evidence.

The judgment of the trial court is therefore affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

33913

COMMERCIAL SERVICE COMPANY,
a Corporation,
Appellant,

vs.

WESTERN VULCANIZING EQUIPMENT
COMPANY, a Corporation,
Appellee.

36a
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

256 I.A. 600³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff, Commercial Service Company, sued defendant, Western Vulcanizing Equipment Company, for a balance alleged to be due under the terms of a written contract for commercial service.

The affidavit of merits admitted the execution of the contract but alleged that defendant had given notice of the cancellation of the contract and discontinuance of the service as the contract provided it might.

There was a trial by the court and a finding for plaintiff in the sum of \$75.80, upon which judgment was entered.

Plaintiff claims that the finding should have been for a larger amount and to that end prosecutes this appeal, demanding that judgment be entered here for the sum of \$372.33. Defendant has not appeared in this court.

The contract under which plaintiff claims was introduced in evidence. It appears to have been executed on May 4, 1928. It provides that plaintiff shall furnish to defendant service in the way of weekly reports, for which defendant agreed to pay \$37.80 a month. In the margin appears the following statement written by plaintiff's sales manager, Mr. Gribble, prior to the execution of the contract: "The subscriber has the privilege of discontinuing this service at the end of ninety days." Mr. Gribble testified that plaintiff received a notice about the middle of September, 1928, to discontinue the service, and that plaintiff was not notified prior to the expiration of ninety days from the date of the contract.

However, Mr. Schram, president of the defendant company, testified that about the middle of June, 1928, he called the office of plaintiff and left word that he wanted to cancel the contract and asked that he be called, which was not done; that just before the holiday in July he called at the office of plaintiff and saw the girl at the switchboard and told her that he wanted Mr. Gribble to get in touch with him as he wanted to cancel the contract at the end of ninety days; that he left a memorandum to that effect.

Mr. Gribble in rebuttal testified that he did not receive any telephone calls from Mr. Schram or anyone connected with defendant; that Mr. Schram never called at plaintiff's office, nor to the knowledge of the witness did the office receive any call from him. He also testified, however, that in his absence one of the girls in the office had charge of the office, but she was not produced as a witness to deny the testimony of Mr. Schram.

Plaintiff cites the case of Bour v. Kimball, 46 Ill. App. 327, which we think is not controlling here, since the terms of the contract there construed were essentially different from those of this contract. Rather, this case seems to turn upon the question of fact as to whether notice of the desire to terminate the service was given. The finding of the court on this issue of fact has the same weight as the verdict of a jury, and it is not argued that the finding of the court is against the manifest weight of the evidence.

Plaintiff also argues on the authority of Kadison v. Fortune, etc., Co., 163 Ill. App. 276, that the court erred in receiving the evidence of Mr. Schram in that it was not consistent with the allegations of the affidavit of merits. The record shows that in the course of the trial the statement of claim was amended by plaintiff, and it does not appear that any rule was thereafter entered upon defendant to file an affidavit to the statement as amended. Moreover, we think it was not necessary either to aver

or to prove that the notice was in writing. That averment was surplusage.

The judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

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There is a very large building on the left side of the road.

The building is very old and the roof is very high.

There is a very large building on the left side of the road.

The building is very old and the roof is very high.

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

JOSEPH KYLE,
Plaintiff in Error.

7
ERROR TO MUNICIPAL COURT
OF CHICAGO.

256 I.A. 600⁴

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Kyle, defendant plaintiff in error, was tried before a jury upon an amended information which charged that he "to-wit, on the 30th day of May, A. D. 1929, at the City of Chicago, aforesaid, did drive and operate a motor vehicle, to-wit, an automobile on a public highway in the City of Chicago, County of Cook and State of Illinois while drunk and intoxicated contrary to the form of the statute," etc. The jury returned a verdict of guilty, defendant's motions for a new trial and in arrest of judgment were denied, and there was a judgment on the verdict and defendant was sentenced to confinement at labor in the House of Correction of the City of Chicago for sixty days and to pay a fine of \$100 and costs.

Defendant here contends that the judgment should be reversed in the first place because, as he says, there is no proof in the record that the place of driving while intoxicated was a public highway. That fact is provable by parole evidence. People v. Camberis, 297 Ill. 455.

Several witnesses testified that the collision, which occurred while defendant was driving, took place in the 5000 block in Irving Park boulevard at No. 5046, and that the matters about which they testified occurred in the City of Chicago, County of Cook and State of Illinois.

Defendant upon examination, as the same appears on page 103 of the record, which is not abstracted, replied to questions as follows:

"Q. You drove east then in Irving Park boulevard,
did you? A. Yes.

Q. When you came near at about LeClaire avenue, what happened there? Just relate what occurred. In the first place, let's digress for a moment. How wide is the street at that point? A. It is about 55 feet.

Q. And it is paved? A. Yes.

Q. Describe it. A. Well, there are two car tracks in the middle of the street, and there's about 20 feet on each side of the car tracks and a curb; then the sidewalks are about 15 feet wide.

Q. And at that point are there buildings built up? A. Yes.

Q. To the sidewalk? A. Store buildings."

This evidence was, we think, sufficient to establish the fact that the offense of which defendant was found guilty was committed in a public highway. Section 250 of chapter 121 (see Smith-Hurd's Ill. Rev. Stat. 1929, p. 2522) provides:

"Public highways shall include any highway, county road, State road, public street, avenue, alley, parkway, driveway or public place in any county, city, village, incorporated town or towns."

Moreover, section 414 of chapter 37 (see Smith-Hurd's Ill. Rev. Stat. 1929, p. 935) provides in substance that the Municipal court, in which this case was tried, shall take judicial notice, in addition to other facts, of all general ordinances of the City of Chicago, of all general ordinances of every municipal corporation situated in whole or in part within the limits of the City of Chicago, and of all ordinances of any municipal corporation remaining in force after the annexation of the territory of such municipal corporation, in whole or in part, to the City of Chicago.

As the streets of the City of Chicago are created by ordinances, it would therefore seem that irrespective of the proof the court, in which defendant was tried, would have been required to take judicial notice that the places named in the testimony were in a public highway. Defendant's first contention therefore is without merit.

It is contended in the second place that the court erred in sentencing defendant to serve his term of imprisonment in the House of Correction.

The statute, for violation of which defendant was

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This evidence was, we believe, sufficient to establish the fact that the extension of which defendant was found guilty was committed in a public highway. Section 27 of Chapter 121 (two hundred and thirty-one, page 1000) provides:

"Public highways shall include any highway, common road, state road, public street, avenue, alley, highway or public place in any county, city, village, incorporated town or township."

Moreover, Section 27 of Chapter 121 (two hundred and thirty-one, page 1000) provides in substance that the municipal corporation in which this case was tried, shall have jurisdiction, in addition to other laws, of all general ordinances of the city of

Chicago, of all general ordinances of every municipal corporation situated in whole or in part within the limits of the city of

Chicago, and of all ordinances of any municipal corporation existing in force after the annexation of the territory of such municipality or corporation, in whole or in part, to the city of Chicago.

As the extension of the City of Chicago was created by ordinance, it would follow that the ordinance of the city of Chicago, in which defendant was tried, would have been repealed

so that defendant would not have been in the territory when he was tried. Defendant's first contention therefore is

without merit. It is contended in the second place that the court erred in concluding defendant to have his case in defendant's in

the State of Illinois. The evidence, we believe, was sufficient to establish the fact that the extension of which defendant was

convicted, provides that punishment by way of imprisonment shall be in the county jail. Section 758 of chapter 38, which, however, was enacted prior to the enactment of the statute under which defendant was convicted (See Smith-Murd's Ill. Rev. Stat. 1929, p. 1072) provides in substance that any person convicted of an offense, the punishment of which is confinement in the county jail, may be sentenced to labor for the benefit of the county during the term of such imprisonment, in the workhouse, house of correction, or other place provided for that purpose by the county or city authorities. The State contends that this statute authorized the court to sentence defendant to imprisonment in the House of Correction.

Defendant says that the act against driving on a public highway while intoxicated, like the Deadly Weapon act, which became a law in 1925 and was construed in People v. Bergeson, 335 Ill. 136, is a complete act in itself, and that this prior statute is therefore not applicable.

The language of section 758 precludes such construction. It is general in its terms, and it was evidently the intention of the legislature that its provisions should be applicable in cases of conviction under such laws as then existed or which might be enacted in the future. The Supreme court of the state has so held in construing a statute where a somewhat similar question was raised. Lyons v. People, 68 Ill. 271. In that case it appeared that the legislature by a general law provided in substance that an indictment should be sufficient which charged an offense in the language of the statute defining it. It was contended by the defendant that this statute should be construed as limited in its application to cases arising under statutes existing at the date of its enactment, but the Supreme court said in substance that it was a general rule of criminal pleading, applicable to all cases within its terms, without regard to the date of the enactment of the statutes under which a particular case should arise.

The precise question as relating to the Deadly Weapon act (see Smith-Murd's Ill. Rev. Stat. 1929, chap. 38, par. 156, sec. 5) has quite recently been decided by this court. People v. Malega, 255 Ill. App. 474. The defendant there, as here, contended that said section which authorized the confinement of a defendant found guilty in the House of Correction was not applicable because the Deadly Weapon act was not a part of the Criminal Code of the state, but complete in itself. We there stated the reasons (which need not here be repeated) constraining us to hold that this statute was applicable, and that the court was authorized in its discretion to sentence defendant to the House of Correction.

For the reasons indicated the judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

33993

UNION INDEMNITY COMPANY,
a Corporation,
Appellant,

vs.

E. L. COOK,
Appellee.

38a
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

256 I.A. 600⁵

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff Indemnity company sued defendant on a check made by defendant to the order of E. A. Crowe on November 20, 1925, and by the payee endorsed. There was a trial by the court and a finding for defendant with judgment thereon, which plaintiff seeks to reverse by this appeal.

At the close of all the evidence plaintiff made a motion for a finding in its favor, which was denied, and it is assigned as error that the court so ruled. It is also urged that the finding for defendant is against the law and the evidence.

The facts appear to be that plaintiff was in the business of writing bonds in favor of the State of Illinois to indemnify the State against loss through failure of certain contractors to carry out contracts with the State for the construction of certain highways. Crowe, to whose order the check was made, is the attorney for plaintiff and acted in its behalf in taking the check. Defendant Cook was a stockholder in the Federal Motor Truck company, which was in the business of selling motor trucks. The company sold trucks to the Cook County Construction Company, which had contracted to do certain work for the State of Illinois. The Construction Company was unable to complete its contract, and by arrangement the Federal Motor Truck Company took over the contract, the agreement being that upon completion of this contract the State should make payment directly to the Federal Motor Truck Company instead of to the Construction Company. The work was completed

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to be used for this purpose.

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the United States is against the law and the evidence.
assigned to work with the army in the field. It is also known to
evidence for a finding of the law, which was found, and it is
at the same time in all the evidence. The first question is

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and there was \$4600 due from the State but the State declined to make payment.

The evidence is contradictory as to the reason for this non-payment by the State. Mr. Crowe, testifying for plaintiff, says that it was because liens and claims had been filed by other parties. Cook testified that it was withheld because of the action taken by plaintiff, Union Indemnity company, Crowe's client. The Union Indemnity company had given a bond for the Illinois Contracting company upon an entirely different job and held an instrument in writing purporting to indemnify it against loss on this bond, and this construction indemnity writing purported on its face to have been executed by defendant and other officers of the Federal Motor Truck company.

Defendant requested plaintiff to release its claim against the \$4600 due the Federal Motor Truck company from the State, but the attorney for plaintiff, in behalf of his client, made a claim based on this counter-indemnity in the sum of \$1150. Defendant contends that this counter-indemnity writing is a forgery, and his testimony is to the effect that pending an investigation to determine whether that writing was genuine he made this check, post-dating it and delivering it to the attorney for plaintiff, with the condition and understanding that if the counter-indemnity bond proved to be genuine the check was to be cashed, but if not the check was to be returned.

It is admitted by all the parties that this alleged counter-indemnity instrument upon investigation was proved to be a forgery. Defendant therefore contends that since the claim of plaintiff is based on a forged instrument there is no valid consideration for the check and that any promise made in compromise of a claim which has no valid existence is without consideration and unenforceable.

The attorney for plaintiff and one Reeves, his agent,

testified to the effect that the check was delivered with the agreement that the attorney should hold the check until the Federal company received its funds from the State Highway Department and that in that event it should be cashed. Reaves, however, said he could not remember the exact questions and answers at the time the check was delivered.

The court saw and heard the witnesses, and the testimony of the defendant as to the transaction seems probable and consistent with the undisputed facts in evidence. We would not be justified in holding the finding of the court to be against the manifest weight of the evidence.

The check having been delivered to secure a claim based upon a forged document, it follows that the check was given without consideration and that plaintiff cannot recover. Brandenstein v. Rasmussen Company, 192 Ill. App. 545; Stump v. Dudley, 207 Ill. App. 537.

It is true that the check itself imports a consideration, but as evidence had been offered rebutting that presumption, the burden was then upon plaintiff to show by a preponderance of the evidence that there was in fact a valid consideration. Wolf v. Peoples Bank, 255 Ill. App. 127.

There is no doubt, as plaintiff contends, that the discharge of an existing indebtedness is sufficient consideration to bind one in signing a note, nor that the compromise of a doubtful right where there is neither actual nor constructive fraud and the parties act in good faith, is sufficient consideration to support a promise. The cases cited by plaintiff sustain these propositions but are not applicable to the facts appearing in this record. For the reasons indicated the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

testimony in the effect that the Court was satisfied with the evidence that the defendant was guilty of the crime charged. The Court found that the defendant was guilty of the crime charged and that the evidence was sufficient to support the verdict. The Court also found that the defendant was not guilty of the crime charged and that the evidence was insufficient to support the verdict.

The Court also found that the defendant was not guilty of the crime charged and that the evidence was insufficient to support the verdict. The Court also found that the defendant was not guilty of the crime charged and that the evidence was insufficient to support the verdict. The Court also found that the defendant was not guilty of the crime charged and that the evidence was insufficient to support the verdict.

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33709

H. S. KAISER COMPANY, an
Illinois Corporation,
Appellant,

vs.

E. L. DRINKWATER, Doing
Business as E. L. DRINKWATER & CO.,
Appellee.

39
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

256 I.A. 601

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of forcible detainer against the defendant to recover possession of certain premises occupied by the defendant. There was a trial by jury and a verdict and judgment in defendant's favor and plaintiff appeals.

The record discloses that defendant was occupying the premises under a written lease from plaintiff and plaintiff claimed no rent had been paid by defendant. The amount claimed to be due was \$1230, which covered a period from August 1, 1927, the date of the lease, until May 31, 1929.

The defense interposed was that the defendant had furnished material and performed certain labor for plaintiff at the latter's request and that at the several times the materials were furnished and the labor performed it was agreed between the parties that the defendant was to charge it against the rent falling due under the lease. These charges, as contended for by defendant, together with checks tendered by defendant to plaintiff for rent for March, April and May, 1929, was at least equal to the amount due under the terms of the lease. The court instructed the jury that if they should find from a preponderance of the evidence that the defendant furnished material and performed labor for the plaintiff at the latter's request, and that plaintiff further requested the defendant to charge the same against the rent as it became due; and the jury should further find that the amount for the labor and material was equal to or in excess of the rent due under the lease, then they should find the defendant not guilty. By this instruction

J. J. KALINOWSKI, JR.
 Illinois Corporation,
 Plaintiff.

vs.

J. J. KALINOWSKI, JR.
 Defendant.

100-2561A-601

1. That the following is a true and correct copy of the original.

Plaintiff brought an action of forcible detainer against

the defendant to recover possession of certain premises occupied by
 the defendant. There was a trial by jury and a verdict and judgment

in defendant's favor and plaintiff appeals.

The record discloses that defendant was occupying the

premises under a written lease from plaintiff and plaintiff claimed

no rent had been paid by defendant. The amount claimed to be due

was \$1250, which covered a period from August 1, 1937, the date of

the lease, until May 31, 1938.

The defense interposed was that the defendant had fur-

nished material and performed certain labor for plaintiff at the

latter's request and that at the several times the materials were

furnished and the labor performed it was agreed between the par-

ties that the defendant was to charge it against the rent falling

due under the lease. These charges, as contended for by defendant,

together with checks tendered by defendant to plaintiff for rent

for March, April and May, 1938, was at least equal to the amount

due under the terms of the lease. The court instructed the jury

that if they should find from the evidence at the trial that

the defendant furnished material and performed labor for the plaintiff

up to the latter's request, and that plaintiff further requested

the defendant to charge the same against the rent as it became due;

and the jury should further find that the amount for the labor and

material was equal to or in excess of the rent due under the lease,

then they should find the defendant not guilty. By this instruction

the question whether there had been an agreement between the parties whereby the defendant was to furnish material and perform labor and charge same against the rent, was expressly submitted to the jury for decision. They found in favor of the defendant.

Plaintiff contends that the court erred in admitting all evidence offered by defendant tending to show that an oral arrangement had been made between the parties whereby the tenant was to pay the rent by furnishing plaintiff with materials and performing services; the contention being that in an action to recover possession, such as the one at bar, no set-off, counter claim or recoupment can be interposed as a defense; that the lease between the parties being under seal, it could not be modified by a subsequent parole agreement, and that a lease for a longer term than one year must, under the Statute of Frauds, be in writing, and cannot be altered by parole.

We think none of these contentions is applicable here. There was no offer of set-off or counter claim, nor was there any varying of the written instrument, nor was the Statute of Frauds in any way involved.

Defendant's sole defense was that it had paid the rent not in money but in materials furnished and services performed. Obviously, if this defense was borne out by the evidence, plaintiff could not recover. There is no reason in law why the landlord and his tenant may not agree, after a written lease has been made, that the tenant may pay the rent by furnishing materials and performing services. Plaintiff denied that any such agreement had been entered into and claimed that the defendant had sought to overcharge him for certain materials furnished and labor performed, but no contention is made in this court that the finding of the jury in favor of the defendant, to the effect that the materials furnished and services performed were reasonably worth the amount of the rent due, is

the question whether there was an agreement between the parties whereby the defendant was to furnish material and services and thereby cause damage to the plaintiff, was submitted to the jury for decision. They found in favor of the defendant.

Plaintiff contends that the court erred in submitting

all evidence offered by defendant tending to show that an oral agreement had been made between the parties whereby the defendant was to pay the cost of furnishing material and services and performing services; the contention being that in an action to recover possession, such as the one at bar, an oral, uncorroborated or uncorroborated agreement can be introduced as evidence; that the issue between the parties being at issue, it could not be satisfied by a mere statement of the defendant, but that a finding for a longer term than one year must, under the statute of Illinois, be in writing, and cannot be shown by parole.

It is said that the contention is applicable here.

There was no offer of evidence of another claim, but the court was required to determine the issue, not the statute of Illinois in any way involved.

Defendant's wife believed that it was paid the rent but in money and in materials furnished and services performed. Obviously, if this defense was borne out by the evidence, plaintiff could not recover. There is no reason in law why the plaintiff and his tenant may not agree, after a written lease has been made, that the tenant may pay the rent by furnishing materials and performing services. Plaintiff cannot show that any such agreement had been entered into and claimed that the defendant had sought to appropriate the same materials furnished and labor performed, but no contention is made in this regard that the jury is aware of the fact. Defendant, to the effect that the materials furnished and services performed were necessary with the amount of the rent due, is

against the manifest weight of the evidence.

Since we hold that the defense was a proper one, and since the jury found on the facts in favor of the defendant, and since there is no argument made that the finding is against the manifest weight of the evidence, the judgment must be affirmed.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

McSurely, P. J., and Katchett, J., concur.

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APPENDIX

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33761

MARIE FORJAN,
Appellee,

vs.

EVENING AMERICAN PUBLISHING
COMPANY and ILLINOIS PUBLISHING
AND PRINTING COMPANY,
Appellants.

40
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

256 I.A. 601²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the Evening American Publishing company, a corporation, Illinois Publishing and Printing company, a corporation, and Garage Service Company, a corporation, to recover damages claimed to have been sustained by plaintiff through the negligence of the defendants in driving an automobile truck which struck and injured her. There was a jury trial, the court directed a verdict of not guilty as to the defendant Garage Service company, and the case was submitted to the jury, which found the remaining two defendants guilty and assessed plaintiff's damages at \$4,000, and the two defendants appeal.

The record discloses that on the evening of March 11, 1925, between six and seven o'clock, as plaintiff was crossing Wentworth avenue, about 50 feet north of the north cross-walk of 32nd street, she was struck and injured by defendants' automobile truck which was being driven north in Wentworth avenue.

It appears from the evidence that plaintiff, a woman about 27 years old, was returning home from her work; that she had her baby and a package in her arms and boarded a southbound street car in Wentworth avenue at 25th street; that the street car stopped at the usual place at the north cross-walk of 32nd street. She testified that she stepped from the rear platform of the street car, then passed behind it and looked to the north and south but saw no traffic in the street; that she then walked a few steps when she saw defendants' truck being driven northward by one of defendants' employees, about ten feet from her; that she endeavored to get out

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W. J. FOX, JR.

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of the way and the driver of the truck turned the truck toward the east to prevent striking plaintiff but was unable to do so. Plaintiff was struck and thrown to the ground; the truck stopped and the driver with two other citizens picked up the woman and the baby and drove her to Mercy hospital, about a mile distant, where she received medical and surgical attention.

Upon examination it was found that she had suffered a number of contusions and bruises on her right arm and right leg, a scalp wound about 2½ inches long and a fracture of the left clavicle. X-ray pictures were taken of all portions of plaintiff's body where it was suspected there might be a fracture, but none was found except the left clavicle. Plaintiff complained of pain in her back in the lumbar region, but it appears no X-ray pictures were taken of that portion at the time. Plaintiff was at the hospital about three weeks and then went home. There was a good union of the clavicle. About 18 months afterwards X-ray pictures were taken which showed perfect alignment and no callous at the point of injury. Plaintiff was laid up for a considerable time after she went home, and was unable to work. Before the injury, the evidence shows, she was strong and healthy and had been working at a candy factory; that about 5 months after the accident she went back to work at the candy factory but on account of pain in her back she had to give up the work after about two weeks; that since the accident she appeared to be pale and sickly and had pains in her back.

In 1926 X-ray pictures were taken of the lumbar region which showed impacted fractures of the fourth and fifth vertebrae, and there was expert testimony to the effect that this condition might have been caused by the accident.

There was further evidence to the effect that plaintiff was still suffering as a result of the accident at the time of the trial, which began April 3, 1929, more than four years after the

accident. There is further evidence as to other ailments suffered by the plaintiff which will be hereinafter referred to.

Theodore W. Vandewarden, called by plaintiff, testified that he was engaged in the business of hauling ice and coal; that just before the accident he was standing on the sidewalk at the northwest corner of 32nd street and Wentworth avenue; that at that time defendants' truck in question, used to deliver newspapers, was standing at the west curb in Wentworth avenue, facing south in front of a store, and that a boy who was with the driver of the truck delivered papers at that place; that about the time the papers were being delivered the southbound street car stopped, the rear end of it being nearly opposite the standing truck; that after the papers were delivered and while the street car was standing, the driver of the truck started south, turned to the left directly in front of the street car which had just started up and which was obliged to slow down or stop to permit the truck to pass; that the truck then turned north on the east side of the street car, and almost immediately he heard a sound as though somebody had been struck by the truck; that the street car proceeded south and the witness and another citizen ran over and assisted the driver of the truck, who had stopped some 75 or 100 feet north of 32nd street near the east curb of Wentworth avenue, to pick up plaintiff from the street and put her in the truck; that the driver, together with the boy who was with him, the witness and the other citizen, rode in the truck to the hospital, taking plaintiff there for surgical and medical attention; that plaintiff was unconscious when they found her in the street.

Norman L. Stephens, the driver of the truck, testified that he was employed by the defendants to drive the truck in delivering defendants' newspapers; that he was given a district bounded on the north by 26th street, on the south by 39th street and on the east by LaSalle street and on the West by Wallace street; that

accident. There is further evidence as to what witnesses witnessed
by the plaintiff which will be hereinafter referred to.
There is a photograph, dated by plaintiff, dated
that that he was engaged in the business of hauling ice and coal;
that just before the accident he was standing on the sidewalk at
the northeast corner of Third Street and Westworth Avenue; that at
that time witnesses' truck in question, used to deliver newspapers,
was standing at the west end of Westworth Avenue, facing north in
front of a store, and that a boy was standing with the driver at the
front of the truck at that time; that about the time the papers
were being delivered the truck started moving and stopped, the rear end
of it being nearly opposite the plaintiff's truck; that after the
papers were delivered and the truck started moving again, the
driver of the truck started moving, turned to the left and
front of the street car which had just started moving and when was
obliged to stop in order to permit the truck to pass; that the
truck then turned north on the east side of the street car, and
almost immediately he heard a sound as though something had been
struck by the truck; that the street car proceeded south on the
sidewalk and another witness called him over and advised the driver of the
truck, who had stopped near 75 or 100 feet north of Third Street
near the east end of Westworth Avenue, to pick up plaintiff. It was
the street car and not the truck; that the driver, plaintiff with
the boy who was with him, the witness and the other witness, rode
in the truck to the hospital, taking plaintiff there for treatment
and a medical attention; that plaintiff was unconscious when they
found him in the street.
Between L. Bergman, the driver of the truck, testified
that he was employed by the defendant to drive the truck in deliv-
ering newspapers; that he was given a license to drive
on the north by West Street, on the south by Third Street and on
the east by Westworth Avenue and on the west by Third Street.

at the time in question he was delivering the final edition of the Evening American; that his first stop on Wentworth avenue was at 31st street where he left some papers; that he then proceeded south but did not stop at the store just north of 32nd street on that trip; that after 31st street his next stop was at 35th street, where he left papers; that he then proceeded south to 39th street, where he left papers, then turned around north, driving in the northbound street car track; that he was driving from 15 to 18 miles an hour passing the street car, which was stopping just north of 32nd street, when plaintiff suddenly ran from behind the rear end of the street car three or four feet in front of him; that he sounded his horn and turned his truck to the east endeavoring to prevent the accident but plaintiff stepped back and was struck by the left front part of the truck; that he did not have any boy assisting him on the trip, and that he stopped his car near the east curb and two men assisted him in taking plaintiff and her baby to Mercy hospital. Stephens further testified that at the time of the accident it was dark and that the two dim lights on his truck were lighted. These are the only two witnesses that gave any testimony as to the manner in which the truck was driven, and this is the only point in the case where the evidence is in conflict.

Defendants contend that plaintiff failed to prove any negligence on the part of the defendants and therefore the court should have directed a verdict as requested at the close of all the evidence. They further contend that in any event plaintiff was guilty of contributory negligence and that the judgment should therefore be reversed.

We have detailed the evidence of the conflicting views as to how the truck was driven at the time in question. If the evidence offered by plaintiff to the effect that the truck was standing at the west curb of Wentworth avenue, just north of 32nd street, at the time the street car came up and stopped, and then proceeded

at the time in question he was delivering the final portion of the
Evening sermon; that his first stop on Wednesday evening was at
that street where he left from church; that he then proceeded south
out his way at the street just north of 15th street on that
trip; that when he reached his home when he was at 15th street, where
he left church; that he then proceeded south on 15th street, where
he left church, then turned around north, driving in the northward
street way; that he was driving from 15 to 16th street on that
passing the street car, which was stopped just north of 16th street.
When plaintiff suddenly ran from behind the rear end of the street
car there at least five or six feet; that he reached his home
and turned his truck to the east entrance to prevent the accident;
but plaintiff stopped back and was struck by the left front wheel of
the truck; that he did not have any dog standing on the left
and that he stopped him and went the next week and the man testified
she is taking plaintiff and her baby to their hospital. She says
further plaintiff lost at the time of the accident it was late and
that the two lights on the truck were lit. There are the
only two witnesses that have any testimony as to the manner in which
the truck was driven, and this is the only point in the case where
the evidence is in conflict.

Defendant contends that plaintiff failed to give any
notice to the city of the defective and dangerous condition
should have looked a variety of witnesses as to the state of all the
evidence. They further contend that in any event plaintiff was
guilty of contributory negligence and that the judgment should
therefore be reversed.

To judge plaintiff the evidence on the conflicting views
as to how the truck was driven at the time in question. If the
evidence offered by plaintiff in the instant case was taken
and at the same time at defendant's expense, that would be the effect
at the time the first car came up and stopped, and then proceeded

south, turned sharply around in front of the street car, driving north in the northbound street car track, be kept in mind, we think the jury would be warranted in finding the defendants were guilty of negligence; and we are also of the opinion that the evidence was such as to warrant the jury in finding that the plaintiff was not guilty of contributory negligence. She testified she looked north and south when she was behind the street car, or a very little distance east of it, but saw nothing in the street. If the jury believed this testimony they might also reach the conclusion that at the time she looked north and south in Wentworth avenue the truck was then turning around in front of the street car and was out of her view. In these circumstances we think that whether the defendants were guilty of negligence and whether plaintiff was guilty of contributory negligence were both proper questions for the jury. Upon a careful consideration of all the evidence in the record we are unable to say that the finding of the jury in favor of plaintiff is against the manifest weight of the evidence.

The defendants next contend that the court refused to instruct the jury properly as requested by the defendants, the complaint being that the court should have given instruction No. 3 offered by the defendants, which is as follows;

"3. The law places upon all persons the duty of exercising reasonable care to avoid injury, and even though the jury should believe from the evidence that the defendants were negligent and the plaintiff was injured thereby, if the evidence also shows that the injury would have been avoided by the exercise of ordinary care by the plaintiff, and that the plaintiff did not exercise such care, you should find the defendants not guilty."

No complaint is made by counsel for plaintiff that this instruction was not proper and should have been given, but he contends that the point was covered by other instructions. We are of opinion that the refusal to give it was not reversibly erroneous, because the jury were told by instruction No. 2, given at the request of plaintiff, that a person driving an automobile in a public

... south, toward ... in front of the ... street ...
... north is the northbound ... he kept in mind, he thinks the jury
... could be ... the testimony was ... of ...
... hence; and we are also of the opinion that the evidence was such
... as to ... the jury is ... that the plaintiff was not guilty
of ... negligence. The ... the ...
... south when ... the ... of a very little distance
... east of it, but ... in the street. It was ...
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... time the ... and ... in ... the truck was
... then ... in front of the ... out ... of her
... view. In ... we think ... whether the ...
... were guilty of negligence and whether plaintiff was guilty of con-
... tributory negligence were both ... for the jury.
... upon a ... of all the evidence in the ...
... and ... to say that the ... of the jury in favor of plaintiff
is ... the ... of the evidence.
The ... that the ...
... the jury ... by the ... the ...
... being ... given ...
... by the ... is as follows:
"A. The law ... all persons the duty of exercising
... care to avoid injury, and every ... the jury should
... have ... the ... were ... and
... the plaintiff was injured ... at the ...
... the ... was ... by the ... of ...
... was ... the plaintiff ... not ...
... the ... the ... not guilty."

... the complaint is ... by ... that ...
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... that the ... was covered by a ... instruction. It was of
... opinion that the ... is ... it was not ...
... because the jury were ... by instruction No. 2, given at the ...
... of plaintiff, that a ... is a ...

street is required to use reasonable care for the safety of persons in the street, and that if they believed from a preponderance of the evidence that plaintiff was crossing the street, and further that defendants before and at the time in question failed to exercise reasonable care in the control and operation of the truck, and that such failure proximately caused plaintiff's injuries, and if they further believed from the evidence that plaintiff before and at the time in question was exercising due and ordinary care for her own safety, then they should find the defendants guilty. By instruction No. 13 given at the request of defendants, the jury were told that the plaintiff was "just as much in duty bound to exercise ordinary care to look out for the defendants' approaching truck and to avoid being struck by the same *** as the driver in charge of defendants' truck was to look out for and to avoid striking the plaintiff." The issues in this case were not complicated, and the jury were told that plaintiff could not recover unless she was in the exercise of due care and caution for her own safety. In these circumstances, we think we would not be justified in reversing the judgment for the refusal to give the instruction requested by the defendants. Nor do we think there was error in the refusal of the court to give instruction No. 1, requested by defendants. That instruction was to the effect that the law did not require or exact that the driver of the truck "should be all the while on his guard against dangers not reasonably to be expected, or against unusual or extraordinary occurrences or conduct on the part of others." This instruction was abstract in form and it was not error to refuse to give it. Moreover, the accident happened at a street intersection, where it was known that passengers might be alighting from the standing street car. We think the court properly refused the offered instruction.

The defendants further contend that the court erred in permitting evidence of ailments complained of by plaintiff which

direct is required to be returned to the safety of the
 in the street, and that if they believed from a consideration of the
 evidence that it was not possible to cross the street, and further that
 before this became known to the time in question failed to exercise
 reasonable care in the manner and location of the truck, and that
 such failure constituted negligent driving, and if they
 further believed from the evidence that defendant before and at the
 time in question was exercising due and ordinary care for his own
 safety, then they should find the defendant guilty. By instruction
 No. 12 given at the request of defendant, the jury were told that
 the plaintiff was "just as much in duty bound to exercise ordinary
 care to look out for the defendant's car as the defendant is to avoid
 being struck by the same car as the driver is to avoid striking
 trucks and to look out for and avoid striking the plaintiff."
 The issue in this case was not complicated, and the jury were
 told that plaintiff could not recover unless she was in the exercise
 of due care and caution for her own safety. In these circumstances,
 we think we would not be justified in reversing the judgment for the
 reason to give the instruction requested by the defendant. For
 to us there was error in the refusal of the court to give
 instruction No. 12, requested by defendant. That instruction was
 to the effect that the jury did not realize or know that the driver
 of the truck should be all the while on his guard against danger
 not reasonably to be expected, or against danger of extraordinary
 occurrence or contact on the part of others. This instruction
 was omitted in form and it was not error or refusal to give it.
 However, the accident happened at a street intersection, where it
 was known that passengers might be alighting from the street car.
 Street car. We think the court properly refused the other in-
 struction.

The defendant is further content that the court erred in
 admitting evidence of witness' conversation with plaintiff which

were not the result of the accident. In support of this, it is said that shortly after the accident X-ray pictures were taken of the plaintiff which showed a fracture of the left clavicle and that other pictures were taken but they were all negative; that no picture was taken of the spine; that some 14 or 15 months later "a woman appears at the laboratories of Dr. Zingrone and is X-rayed." At that time an X-ray picture was taken of the spine and lumbar region which disclosed a fracture of the fourth and fifth vertebrae. The evidence shows that plaintiff was this woman who was X-rayed at this time. Further testimony was given that in 1927, about two years after the accident, plaintiff was treated by another doctor who gave testimony concerning the condition of plaintiff which was not the result of the accident. And counsel states that although when the hypothetical questions were put to the doctor such other ailments were eliminated from the questions, yet, nevertheless, the jury had the evidence before them and "considered it in the awarding of damages." Of course the testimony of the doctor concerning any ailment of the plaintiff not the result of the accident, was improper. But we think a reading of all the evidence in the record shows that the jury understood that plaintiff was making no claim for damages except for injuries which she sustained as a result of the accident, and the jury was specifically instructed on this question. Moreover, no argument is made that the judgment is excessive.

A further complaint is made that the court unduly restricted the cross-examination of a doctor who was called to testify for plaintiff. On cross-examination counsel asked the doctor the following question: "Any person might have a fall, sustain this kind of a fracture, and go about their affairs suffering a little pain but gradually getting better, might they not?" An objection

right to show, if they could, that a person injured as was plaintiff, might gradually get better; but again, this would affect only the amount of the verdict and, as stated, no complaint is made that it is excessive. Moreover, we think, upon a consideration of all the evidence on this phase of the case, plaintiff was not so prejudiced as would warrant us in disturbing the verdict.

A further complaint is that the declaration did not state a cause of action. When the case went to trial there were a number of counts in the declaration but at the conclusion of plaintiff's case all the counts were withdrawn except the first. The first count stated a cause of action, but in concluding it was alleged that "by means whereof plaintiff was injured, and sustained damages as alleged in the last count of this declaration." It is contended by counsel for defendants that this count was not complete in itself and that no reference could be made to the other counts because they had been withdrawn and were out of the case. We think this contention is unsound. While all of the counts but the first were out of the case, they could still be considered for reference purposes. Shaughnessy v. Holt, 236 Ill. 485. A further complaint is made that the jury returned two verdicts - one a directed verdict finding the defendant Garage Service Company not guilty, and the other finding the two defendants guilty and assessing the plaintiff's damages. We think this is the proper practice.

The judgment of the Circuit court of Cook county is affirmed.

AFFIRMED.

McSurely, P. J., and Hatchett, J., concur.

33821

H. A. KINGSBURY,
Appellant,

vs.

IDA M. STATEN,
Appellee.

4/a
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

256 I.A. 601³

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, the payee of a promissory note dated September 1, 1917, for \$551.18, due on or before 45 days after date, brought suit against the defendant, the maker of the note, claiming the face of the note with interest thereon. The defendant filed an affidavit of merits in which he set up (1) that there was no consideration; (2) that the consideration wholly failed; (3) that the making of the note was procured by fraud or circumvention in that the payee obtained the note from the defendant upon the express agreement that he would discount the note and use the proceeds thereof to pay upon an indebtedness of the defendant to Sol Guth, which indebtedness was evidenced by mortgages on Florida land; (4) that she gave the note to plaintiff, who was to pay Guth as above stated, and averring that plaintiff had not paid Guth the money. There was a trial before a judge and a jury and a verdict rendered in defendant's favor; judgment was entered on the verdict and plaintiff appeals.

There is no material dispute as to the essential facts. From the evidence it appears that plaintiff was engaged in the banking business at Washington, Illinois; that he sold Florida lands belonging to Guth, who also lived at Washington; and defendant became the owner of the lands. There were two mortgages, one apparently executed by a Mr. Harlan and the other by a Mr. Staten, the defendant's husband. Some interest on these mortgages was due, and plaintiff, who was acquainted with the defendant, came to Chicago endeavoring to collect the interest. He called on the

defendant in reference to the matter. The defendant stated that she did not have the money but that if plaintiff would advance it and pay it to Guth for her, she would execute her note to plaintiff. This was agreed upon and the note in suit was then made. Plaintiff testified that he paid the money, \$556.62, to Guth shortly after the date of the note. Guth also testified that the money was paid to him by plaintiff as interest on one or both of the Florida mortgages. Defendant testified that about 1926 plaintiff and defendant met in defendant's attorney's office in Chicago and at that time plaintiff gave her a statement showing the amount due Guth on the mortgages, and she offered this in evidence. There are a number of items in the statement and one of them appears as a credit dated October 12, 1917, showing "a partial payment of interest - \$556.22."

There is no dispute as to the foregoing facts.

There was some evidence on behalf of the defendant to the effect that just prior to the time she executed the note in suit, plaintiff told her that she was personally liable on the Florida mortgages; and the contention seems to be that since defendant had not executed the Florida mortgages there was some misrepresentation and fraud on the part of plaintiff in obtaining the note from defendant. We think there is no merit in this contention. Defendant's own testimony shows that she wanted to pay off the mortgages on her Florida land, and while she was not personally liable it is obvious that if she desired to clear her land of the mortgages she would have to pay them, principal and interest.

The defendant's position seems to be that under the arrangement made by her with the plaintiff at the time of the execution of the note, it was the duty of plaintiff to see that when he paid the money to Guth it was applied by Guth in payment of the interest due on the Florida mortgages. Even if we assume

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this contention to be sound, the uncontradicted evidence shows that the money was applied on the Florida mortgages by Guth. Guth so testified, and the statement given to defendant, above mentioned, and which was offered in evidence by the defendant, shows that the money was so applied.

The court, at the request of the plaintiff, instructed the jury that if they believed from a preponderance of the evidence "that the defendant Ida M. Staten executed the note in evidence and delivered it to the plaintiff, A. M. Kingsbury, and that the said Kingsbury paid the amount of said note at the request and direction of the defendant to one Sol Guth, then in that state of the proof you should find in favor of the plaintiff." The undisputed evidence showed that the defendant gave the note in suit to plaintiff, that plaintiff paid the amount of the note, at defendant's request, to Guth, and therefore under this instruction, in view of the undisputed evidence, the verdict should have been for the plaintiff. But since it was in favor of the defendant, it is contrary to all the evidence and to the instructions of the court.

At the close of all the evidence plaintiff moved for an instructed verdict. The motion was overruled. We think the motion should have been allowed and the instruction given. Since we are of the opinion that, viewing all the evidence in the light most favorable to the defendant, there was no evidence of a defense, it would be a useless ceremony to reverse the judgment and remand the cause. The law never requires the doing of a useless act. Therefore the judgment of the Municipal court of Chicago is reversed with a finding of fact and judgment will be entered in this court in favor of the plaintiff and against the defendant for the face of the note with interest, which is \$990.00. In support of our action we cite Mirich v. Forachner Contracting Co., 312 Ill. 343; Roe v. Roe, 315 Ill. 120; Sinopoli v. Chicago Rys Co., 316 Ill. 609;

This contention is to be denied, the uncontroverted evidence being that the money was applied on the Florida mortgage by GUTH, and not as testified, and the statement given to defendant, where mentioned, and which was alleged in evidence by the defendant, shows that the money was so applied.

The court, at the request of the plaintiff, instructed the jury that it may believe from a preponderance of the evidence that the statement that the money was applied to the mortgage and delivered to the plaintiff, A. B. Hargrave, and that the said plaintiff paid the amount of said note as the request and direction of the defendant for the said Guth, the in fact words of the grantor you should take to favor of the plaintiff. The uncontroverted evidence shows that the defendant gave the note in said to plaintiff, that plaintiff paid the amount of the note, as defendant's request, to Guth, and therefore under said instruction, as well as the uncontroverted evidence, the verdict would have been for the plaintiff. But since in the favor of the defendant, it is contrary to all the evidence and to the instructions of the court.

At the time of all the evidence plaintiff never was as instructed verdict. The money was never paid, as shown the motion picture has been placed on the instruction given. Since we are of the opinion that, viewing all the evidence in the light, most favorable to the defendant, there was no evidence of a defense, it would be a needless expense to require the jury and counsel to appear. The law never requires the taking of a needless case.

Therefore the judgment of the court is reversed and the case is remanded with a finding of fact and judgment will be entered in said court in favor of the plaintiff and against the defendant for the sum of \$1000.00, in support of law. The case is remanded, with the finding of fact and judgment as above stated to the court of the plaintiff and against the defendant for the sum of \$1000.00, in support of law. The case is remanded, with the finding of fact and judgment as above stated to the court of the plaintiff and against the defendant for the sum of \$1000.00, in support of law.

Myers v. Northwestern El. R. R. Co., 318 Ill. 24; Northern Trust Co. v. Chicago Ry. Co., 318 Ill. 402.

JUDGMENT REVERSED WITH FINDING OF FACTS
AND JUDGMENT HERE.

McSurely, P. J., and Matchett, J., concur.

FINDING OF FACTS.

We find as ultimate facts that the defendant executed the note in suit payable to plaintiff in consideration that plaintiff pay to Sol Guth interest on mortgages on land owned by defendant; that plaintiff paid the money to Guth and that Guth applied it in payment of the interest on the Florida mortgages.

STATE OF NEW YORK, IN SENATE,
January 1, 1903.

REPORT OF THE COMMISSIONERS OF THE LAND OFFICE,
FOR THE YEAR 1902.

ALBANY: JAMES B. LEECH, STATE PRINTER,
1903.

RECEIVED JANUARY 1, 1903.

TABLE OF CONTENTS.

As this is a summary of the work of the Land Office, it is not possible to give a full and complete account of the same. The report is divided into two parts, the first of which contains a general statement of the work of the office, and the second of which contains a detailed statement of the work of the office, as shown by the following table of contents.

33860

HENRIETTA ASHTON,
Appellant,

vs.

CECIL C. ASHTON,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

256 I.A. 601⁴

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the complainant, Henrietta Ashton, seeks to reverse an order entered in the Superior court of Cook county, dismissing her petition, by which she sought to have the defendant committed for failure to comply with the decree for separate maintenance entered in favor of the complainant and against the defendant, requiring the defendant to pay the complainant for the support of herself and her child.

The record discloses that on August 13, 1919, complainant filed her bill for separate maintenance. Summons was served on the defendant by a sheriff of Cook county and September 20, 1919, defendant filed his answer denying that he was guilty of the charges made against him in the bill. The case was afterwards heard by the chancellor and June 24, 1920, a decree was entered as prayed for by complainant and the sum of \$60 a week was awarded her for the support of herself and her child. The defendant prayed for and was allowed an appeal to this court from the decree but did not perfect it. October 25, 1920, he made a motion, supported by his sworn petition, that the amount of alimony he was required to pay by the decree be reduced. The matter was referred to a master in chancery of the Superior court of Cook county. Both parties appeared before the master and considerable evidence was introduced. The master made up his report and recommended that the decree be modified to require defendant to pay \$30 instead of \$60 a week. A decree was entered as recommended by the master on March 10, 1921. The next that appears from the record is that February 4, 1929, complainant filed her petition setting up inter alia that the

RECEIVED
JAN 11 1961
U.S. DEPT. OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C.

2581.A.601

RE: JAMES EARL RAY, AKA; ALIASES; THE DEEDS OF THE CRIME.

On this report for information, Memphis, Tennessee.

There is no record in the Memphis County of Cook County, Illinois for the year 1958, by which was sought to have the defendant committed for failure to comply with the terms of his parole. The defendant is listed in the Memphis County of Cook County, Illinois, as having been committed to the Memphis County of Cook County, Illinois, for the year 1958, by which was sought to have the defendant committed for failure to comply with the terms of his parole. The defendant is listed in the Memphis County of Cook County, Illinois, as having been committed to the Memphis County of Cook County, Illinois, for the year 1958, by which was sought to have the defendant committed for failure to comply with the terms of his parole.

The record discloses that on August 11, 1958, the defendant was listed in the Memphis County of Cook County, Illinois, as having been committed to the Memphis County of Cook County, Illinois, for the year 1958, by which was sought to have the defendant committed for failure to comply with the terms of his parole.

The defendant listed his answer stating that he was guilty of the charges made against him in the bill. The case was returned to the Memphis County of Cook County, Illinois, for the year 1958, by which was sought to have the defendant committed for failure to comply with the terms of his parole. The defendant listed his answer stating that he was guilty of the charges made against him in the bill. The case was returned to the Memphis County of Cook County, Illinois, for the year 1958, by which was sought to have the defendant committed for failure to comply with the terms of his parole. The defendant listed his answer stating that he was guilty of the charges made against him in the bill. The case was returned to the Memphis County of Cook County, Illinois, for the year 1958, by which was sought to have the defendant committed for failure to comply with the terms of his parole.

The record discloses that on August 11, 1958, the defendant was listed in the Memphis County of Cook County, Illinois, as having been committed to the Memphis County of Cook County, Illinois, for the year 1958, by which was sought to have the defendant committed for failure to comply with the terms of his parole. The record discloses that on August 11, 1958, the defendant was listed in the Memphis County of Cook County, Illinois, as having been committed to the Memphis County of Cook County, Illinois, for the year 1958, by which was sought to have the defendant committed for failure to comply with the terms of his parole.

defendant was in default in the sum of more than \$2,300 and prayed he be ruled to show cause why he should not be punished for contempt of court. An order was entered accordingly. March 15, 1929, defendant filed his answer denying that he was in arrears and setting up that the court was without jurisdiction in the separate maintenance suit because there was no allegation in the bill that the defendant was a resident of Cook county and that the decree failed to find that, at the time of the filing of the bill he was a resident of Cook county. The matter was heard by the chancellor and a transcript of the evidence taken on the hearing of the separate maintenance suit was offered in evidence as well as the evidence taken by the master on the defendant's petition to reduce the amount of alimony. The chancellor found that the defendant was in arrears in payment of alimony as alleged by complainant, and that he had been at all times able to make the payments. The court sustained the defendant's contention that the court was without jurisdiction to enter the decree, discharged the rule to show cause, and dismissed complainant's petition.

It was alleged in the bill for separate maintenance that the complainant was a resident of Chicago, Cook county, Illinois; that she married defendant at Waukegan, Illinois, October 17, 1906; and continued to live with defendant as his wife until April 28, 1919, when she was compelled to live separate and apart from him through no fault of her own. There was no specific allegation as to the residence of defendant. Defendant filed his answer admitting the marriage but denying the charges made against him in the bill. The decree recites that the cause came on to be heard on the bill, answer and replication and testimony taken in open court. The court found that it had jurisdiction of the parties and of the subject matter, and further found that defendant was guilty of the charges made against him. There was no specific finding that at the time of the filing of the bill defendant was a resident of Cook county.

defendant was in custody in the year 1935 and was
 he believed to have been why he should not be arrested for contempt
 of court. In 1935 was arrested and held in custody. In 1935, he
 learned that his mother was dead and that he was in custody and was
 he that his mother was without jurisdiction in the custody of his
 mother and because there was no jurisdiction in the bill that the de-
 fendant was a resident of Cook County and that the court failed to
 find that, at the time of the filing of the bill he was a resident
 of Cook County. The matter was moved by the chancellor and a trans-
 cript of the evidence taken on the hearing of the separate writ-
 ings was filed in evidence as well as the evidence taken by
 the master on the defendant's petition in removal and removal of al-
 ienage. The chancellor found that the defendant was in custody in
 payment of alimony, as alleged by the plaintiff, and that he had been
 at all times able to make the payments. The court sustained the
 defendant's contention that the court was without jurisdiction to
 enter the decree, discharged the rule to show cause, and dismissed
 defendant's petition.

It was alleged in the bill for separate maintenance
 that the plaintiff was a resident of Chicago, Cook County, Illinois;
 that she married defendant at Chicago, Illinois, October 14, 1931;
 and continued to live with defendant as his wife until April 23,
 1935, when she was compelled to live separate and apart from him
 through no fault of her own. There was no marital obligation as
 to the defendant of defendant. Defendant filed his answer admitting
 the marriage but denying the charges against him in the bill.
 The court noted that the cause came on to be heard on the bill,
 answer and verification and testimony taken in open court. The court
 found that it had jurisdiction of the parties and of the subject
 matter, and further found that defendant was guilty of the charges
 made against him. There was no specific finding that at the time
 of the filing of the bill defendant was a resident of Cook County

Defendant contends that the order appealed from should be affirmed because there was no allegation in the bill or finding in the decree that defendant was a resident of Cook county at the time the bill was filed, as required by paragraphs 22 and 23, secs. 1 and 2, chap. 63, Cahill's Statutes 1929; and in support of this cites the cases of Becklenberg v. Becklenberg, 232 Ill. 120, and Briney v. Briney, 223 Ill. App. 119. Section 1 provides that married women who without their fault live separate and apart from their husbands may have their remedy in equity against their husbands "in the Circuit court of the county where the husband resides" for the reasonable support and maintenance while they so live apart. Section 2 provides, "Proceedings under this Act shall be instituted in the county where the husband resides," etc.

The Becklenberg case was a suit for divorce. The court said (p. 121):

"No certificate of evidence was taken, and it is urged that the facts found by the decree do not show that the court had jurisdiction of the subject matter, for the reason that the decree does not find, by specific recital, that the complainant had resided in this State one whole year next before filing his bill, and does not find, by like recital, that the proceedings were had in the county where the complainant resided."

The court held that, since it did not appear from the pleadings that the parties had resided in this State for more than a year immediately prior to the filing of the bill, and there was no allegation as to the county in which the defendant resided, and since there was no specific finding that the defendant was guilty of habitual drunkenness as charged in the bill, the decree must be reversed. It will be noted that that case was under the Divorce act and that there was no certificate of evidence in the record.

The Briney case was a suit for separate maintenance, and there was no allegation in the bill nor a finding in the decree that the defendant was a resident of Cook county. The court also stated that there was no certificate of evidence in the record and reversed

Complainant contends that the case at bar is to be distinguished from the Becklenberg and Briney cases by the fact that in the instant case the evidence heard by the chancellor on the hearing of the separate maintenance bill, and on defendant's motion to reduce the alimony, which was heard on evidence taken by the master in chancery, is in the record and that this evidence shows beyond peradventure that the defendant was a resident of Cook county, as required by the statute. We think this contention must be sustained.

Nelleen v. Nelleen, 238 Ill. App. 622, number 29604, not reported, was a bill for separate maintenance. A rehearing was allowed and the point was made that the court was without jurisdiction to enter the decree because it did not appear from the bill or decree that the defendant was a resident of Cook county at the time the bill was filed. The court there discusses the Becklenberg and Briney cases and points out that in neither of them was there a certificate of evidence in the record, and said:

"In this case, unlike the cases cited, the evidence has been preserved by certificate, and, while it is true that the bill does not allege specifically that the defendant husband is a resident of Cook county, in which suit was filed, that fact was made to appear from the evidence."

The instant case was heard by the Superior court of Cook county and a decree entered. Some six months thereafter the defendant petitioned that court to reduce the alimony and it was referred to a master in chancery of the Superior court of Cook county, before which both parties appeared and evidence was introduced. The bill alleged that the defendant was the owner of stock of great value and the principal owner of the business, which was conducted in Cook county. The summons was served upon the defendant by the sheriff of Cook county and he filed his answer.

On the hearing of the separate maintenance suit complainant testified that she went to New York at defendant's request, taking her baby with her, and that when she returned to Chicago she went to live at the Cambridge Apartment hotel in Chicago; that she

again left Chicago in April because defendant did not want her to live in Chicago with her daughter; that she again returned to Chicago in October, 1919. A police officer of the City of Chicago testified that he arrested defendant, before the separate maintenance trial, on North Ashland avenue, where he found defendant living with another woman, and the defendant himself testified that he had subleased this apartment. He further testified that shortly after he and complainant were married they lived in a four-room flat on 48th street; that they afterwards lived together on 45th street; at the Plaza hotel; 714 Waveland avenue; 4938 Sheridan Road; 4924 Sheridan Road; 4921 Sheridan Road, and 5116 Sheridan Road; and that he lived there until long after his wife left for New York; that, "I saw my wife at the Cambridge apartments. I procured this apartment for her upon her return to Chicago;" that after talking with his wife about their differences, she told him the best thing for her to do was to "pack up here, go to New York and never come back to Chicago again;" that he told her not to go to New York. There is further evidence in the record to the effect that defendant lived at Homewood, Illinois, in Cook county.

A reading of the testimony in the record leads to but one conclusion - that on the whole record not the slightest doubt remains but that the defendant was a resident of Cook county for a number of years prior to and after the filing of the bill in the instant case. In The People v. Huffman, 325 Ill. 334, in passing on the proof of venue necessary in a criminal case, the court said:

"While it is not necessary that any witness should testify in so many words that a crime was committed in a certain county in order to establish the venue (People v. Shaw, 300 Ill. 451), and the venue can be proven by circumstances, (People v. Farnsworth, 324 Ill. 96), yet when circumstances, alone, are relied upon for such proof the circumstances must be such as to exclude every reasonable hypothesis other than that the crime was committed in the county in which the venue is laid in the indictment."

In passing on a similar question the Supreme Court in

Sullivan v. The People, 122 Ill. 385, said (pp. 386, 387):

"It is charged in the indictment, the offense of which defendant was convicted was committed in Cook county, and when all the evidence in the case is considered, that fact sufficiently appears. The prosecuting witness testified she lived on 'Emerson avenue, formerly called Ashley street,' and that the offense was committed in her house. One of the witnesses for the defense testified that she lived near the prosecuting witness, at whose house the trouble occurred, and that she lived on Emerson avenue for twenty years and in Chicago twenty-seven years. This evidence, considered in connection with the affirmative fact that appears from the record, the trial was had in Cook county, where it is alleged the offense was perpetrated, is sufficient to support the finding of the jury the offense was committed in the county of Cook, as alleged in the indictment. It is proved the offense was committed on 'Emerson avenue,' and that it is a street in Chicago. Of course this court will take judicial notice that Chicago is in Cook county. Proof that a crime is committed in Chicago, is proof that it was committed in Cook county. On the whole record considered, not the slightest doubt remains the offense of which defendant was convicted was 'committed in the county alleged in the indictment.'"

The order of the Superior court of Cook county is reversed and the matter remanded for further proceedings in accordance with the views herein expressed.

REVERSED AND REMANDED.

McSurely, P. J., and Katchett, J., concur.

33878

FLORA S. KROEMCKE,
Appellee.

vs.

CHICAGO RAILWAYS COMPANY,
CHICAGO CITY RAILWAY COMPANY,
CALUMET & SOUTH CHICAGO RAILWAY
COMPANY and THE SOUTHERN STREET
RAILWAY COMPANY, Corporations,
Doing Business as CHICAGO
SURFACE LINES,
Appellants.

4 3a

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

256 I.A. 602

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendants to recover damages for personal injuries claimed to have been sustained by her on account of the alleged negligence of the defendants. There was a jury trial and a verdict and judgment in her favor for \$6800, and the defendants appeal.

The record discloses that shortly after five o'clock in the evening of December 10, 1926, plaintiff, in alighting from one of defendants' street cars, slipped and fell, sustaining a compound, comminuted fracture of both bones above the ankle of her left leg. The theory of the plaintiff was that the defendants permitted the step of the car from which she was alighting to be covered with snow and ice, which caused her to slip with the resultant injuries. On the other hand, the defendants contend that there was no ice on the step and little or no snow, and that plaintiff was injured through no fault or negligence of the defendants.

The defendants contend there should have been a directed verdict in their favor at the close of all the evidence; that in any event, the verdict of the jury is against the manifest weight of the evidence, and that the court erred in giving and refusing instructions. Other contentions are made which will hereinafter be referred to.

Summarized, the evidence is to the effect that plaintiff and two lady friends had been attending a card party on the afternoon of December 10th and in returning home about five o'clock in the evening boarded one of defendants' eastbound street cars in Irving Park boulevard, Chicago. The car was of the pay-as-you-enter type, boarded by passengers at the rear end, where the conductor received the fares. Passengers might be discharged both at the front and rear ends of the car. There was some snow on the ground which had apparently fallen a few days before. On the evening in question it was thawing so that there was snow and slush; there had been slight snow that afternoon which turned into mist. The street car in question was taken from the car barn on Elston avenue, driven north about one-half mile to Irving Park boulevard and then west in that street to the end of the line, which was near the Dunning Institution. On the westbound trip the steps at the front and rear ends of the car on the north side were down or open so that passengers in boarding or alighting from the car could use them, while the steps on the south or blind side of the car on this trip were folded up against the car. When the car reached its destination the trolley pull was adjusted, the steps on the north side folded up and those on the south side turned down or opened for use of the passengers. On the eastbound trip the car had traveled about four miles at the time of the accident, and during that trip 25 or 30 passengers had alighted from it through the front exit, using the front step. When the car reached Sacramento avenue, which is two blocks west of Francisco avenue, where the accident occurred, one of the ladies testified she got off the car through the front exit. When she stepped off she turned around to help her two and one-half year old daughter from the car, and then noticed that there was a snowy slush packed solid on the step, that the step was covered with this and was slippery. The other lady of the party testified that she got off the car at Francisco avenue just after

The first of these was the fact that the
 evidence of the witnesses was not
 consistent. The second was the fact
 that the evidence was not
 sufficient to establish the
 guilt of the accused. The third
 was the fact that the evidence
 was not sufficient to establish
 the guilt of the accused. The
 fourth was the fact that the
 evidence was not sufficient to
 establish the guilt of the accused.

plaintiff; that plaintiff slipped on the step; that one corner of the step was packed with slush about 2½ inches thick; that the streets were slushy. Plaintiff testified that it had snowed some during the day, which was cloudy; that later the snow turned into a sleety rain and slush; that as she was about to alight from the car she looked at the step, took hold of the rail, and that as her foot touched the step it slipped off and her leg went under her and broke; that she did not see anything wrong with the step; that she just looked where to place her foot but did not have time to examine the step.

The motorman testified that when they took the car out of the car barn in the afternoon the steps were dry; that there was no snow or ice on them and they were in perfect condition mechanically; that when he got to the west end of the run, near Dunning, in preparing for the eastbound trip he saw the step was down and in perfect condition; that there was no snow or ice on it; that during the eastbound trip, which was about four miles, he had occasion to open the door to discharge passengers about 25 times and that he could see the step at all times when the passengers got off and that at no time was there an accumulation of ice or snow on the step; that after plaintiff was injured he and others assisted her; that he looked carefully at the step; that it was a little bit wet but there was no accumulation of slush, ice or snow on the step or anything that could catch a person's heel.

The conductor testified that when they started out of the barn the steps and platform were dry; that there was ^a little dampness inside the car, which had been out that morning; that there was no snow or ice on the steps when the car was taken out; that when the car was made ready for the eastbound trip there was no snow or ice or any foreign substance on the steps; that when the accident occurred he went to the front of the car and looked carefully

himself; that himself slipped on the step; that one corner of the step was packed with debris which he stepped upon; that the debris were icy. That himself stepped down it and stepped down it. That the step, which was icy; that I took the step and stepped into a slippery path and slipped; that as he was about to slip the step she looked at the step, took hold of the rail, and that as she took hold of the step it slipped out and her leg went under her and broke; that she was not stepping down with her step; that she was looking down where to step and that she had gone down to the end of the step.

The other side of the step was icy and that she was out of the platform in the afternoon the debris were icy, that there was no snow or ice on the step and that there was no perfect condition when she fell; that when she got to the end of the step, near the railing, in stepping for the step and that she was not on the step and in perfect condition; that there was no snow or ice on the step and that the railing was icy, which was about four inches, and had no snow on it when she fell to the ground. That she was about 25 years old and that she could see the step at all times and that the railing was icy and that at no time was there an accumulation of ice on the step; that the railing was icy and that she was not on the step and that he looked carefully at the step; that it was a little bit wet but there was no accumulation of water, but he was on the step at anything that would cause a person's fall.

That the other side of the step was icy and that she was out of the platform in the afternoon the debris were icy, that there was no snow or ice on the step and that there was no perfect condition when she fell; that when she got to the end of the step, near the railing, in stepping for the step and that she was not on the step and in perfect condition; that there was no snow or ice on the step and that the railing was icy, which was about four inches, and had no snow on it when she fell to the ground. That she was about 25 years old and that she could see the step at all times and that the railing was icy and that at no time was there an accumulation of ice on the step; that the railing was icy and that she was not on the step and that he looked carefully at the step; that it was a little bit wet but there was no accumulation of water, but he was on the step at anything that would cause a person's fall.

at the front step to ascertain its condition; that there was nothing wrong with it other than it was a little wet; that there was no snow, ice or slush on it.

A boy fifteen years old, then attending highschool, was a passenger and standing on the front platform. He testified that he saw plaintiff fall; that he went to the exit where plaintiff had just fallen and looked at the step; that it was wet and a little slushy; that aside from this there was nothing on the step. no ice or anything hard on it; that it was just snowing a little bit at the time.

Another witness, a painter and decorator, 37 years old, testified that he was about 100 feet from the street corner at the time plaintiff was injured; that immediately after the accident he ran over to see what had happened and helped pick plaintiff up and that the car was standing at the time; that he heard some men there talking about the step; that he then looked at the step and there was probably a little water on it - just a little wet; that there was no snow or ice or hard lumps or anything on the step, nor anything uneven about it.

Under the law it was the duty of the defendants to use the highest degree of care consistent with the practical operation of its street cars to remove snow and ice from its cars. But upon a careful consideration of all the evidence in the record, we are of the opinion that the court would not be warranted in directing a verdict on behalf of the defendants at the close of the evidence. Libby, McNeill & Libby v. Cook, 222 Ill. 206. There was evidence tending to show that plaintiff was in the exercise of due care for her own safety and that the defendant was negligent in the maintenance of the street car step. We are further of the opinion, however, that the verdict in favor of the plaintiff, the finding in which is in effect that the step of the street car was in an unsafe condition, is against the manifest weight of the

evidence. In this view of the case it is our duty to set aside the verdict and judgment. Donelson v. East St. Louis Ry. Co., 235 Ill. 625.

The court, at the request of the plaintiff, gave the following instruction: "The court instructs the jury that while, as a matter of law, the burden of proof is upon the plaintiff, and it is for her to prove her case by a preponderance of the evidence, still if the jury find that the evidence bearing upon the case preponderates in her favor, although but slightly, it would be sufficient for the jury to find the issues in her favor." The defendants contend that this instruction is reversibly erroneous. The giving of a similar instruction has often been passed upon by our Supreme court, but in no case have we found a judgment reversed solely on account of this instruction. However, in recent years the Supreme court has criticized this instruction, and in the late case of Molley v. Chicago Rapid Transit Co., 335 Ill.164, reversed the judgment, one of the reasons being the giving of such an instruction. In the instant case, where the evidence was so sharply conflicting on the vital point, viz, as to the condition of the street car step, the instruction ought not to have been given.

Complaint is made as to the argument of counsel for the defendants as to the refusal of the court to give offered instructions numbers 1, 2, 21 and 22, offered by defendants. We think offered instruction number 1 might have been given; but we are further of the opinion that there was no error in refusing offered instruction number 2, nor in modifying numbers 21 and 22. The argument of counsel, while in some respects somewhat objectionable, was not of such a character as to warrant any disturbance of the judgment by us.

The doctrine of res ipsa loquitur was in no way

applicable to the case. Here specific negligence was charged, and evidence was offered tending to prove and to disprove such charge.

For the reasons stated the judgment of the Circuit court of Cook county is reversed and the cause is remanded.

REVEREND AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

...to the fact that the evidence was changed, and
 evidence was being taken to prove that the ...
 For the reasons stated the judgment of the Circuit
 Court of Civil Justice is reversed and the case is remanded.
 REVEREND AND HONORABLE

REVEREND, J. J., and REVEREND, J., JUDGES.

33898

VIVIAN WHITELEY,
Appelles,

vs.

CHICAGO AND NORTHWESTERN
RAILWAY COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

256 I.A. 602²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover damages for personal injuries she claimed to have sustained through the negligence of the defendant. There was a jury trial and a verdict and judgment in plaintiff's favor for \$34,000 and the defendant appeals.

The record discloses that on April 26, 1927, the plaintiff, who was then about thirty-two years old, in attempting to board one of defendant's suburban trains at its Irving Park station in Chicago, was severely injured. Her theory of the case is that as she was in the act of boarding the train which was standing at its regular stopping place, it started up before she had time to get on and she was thrown and severely injured. On the other hand, the theory of the defendant is that plaintiff attempted to board the train after it had started.

It appears from the evidence that plaintiff lived with her husband about 150 feet from the stairway leading up to the defendant's Irving Park station; that she was employed in the downtown district and had been going to and from her work on defendant's suburban trains for about two years prior to the accident. The tracks of the defendant are elevated at this station, and Kedvale avenue, a public street, passes under the tracks dividing the station into two parts. At this point the tracks run in a southeasterly and northwesterly direction. For the purpose of this opinion we shall refer to that portion of the station nearest the downtown terminal of the railroad as "south" and the other as

VIVIAN WILLIAMS,
Defendant.

vs.

CHICAGO AND NORTHWESTERN
RAILROAD COMPANY,
Plaintiff.

STATE OF ILLINOIS, County of Cook.

IN SENATE.

2561A.602

ALL WHOLESALE AND RETAIL DEALERS IN THE STATE OF ILLINOIS.

That this Court do hereby order and decree that the defendant do

pay to the plaintiff the sum of \$100.00, with interest thereon from the date of the judgment to the date of payment.

There was a jury trial.

and a verdict was returned in favor of the plaintiff and the

defendant.

The record shows that on April 25, 1927, the plaintiff

was then about thirty-two years old, in attempting to

board one of defendant's trains at the Irving Park station

in Chicago, was severely injured. Her theory of the case is that

as she was in the act of boarding the train which was standing at

the regular stopping place, it started up before she had time to

get on and was thrown and severely injured. On the other hand,

the theory of the defendant is that plaintiff attempted to board

the train after it had started.

It appears from the evidence that plaintiff lived with

her husband about 120 feet from the station building up to the de-

fendant's Irving Park station. She was not employed in the defendant's

business and had been paid to the defendant's train on defendant's

regular train for about two years prior to the accident. The

train of the defendant was stopped at this station, and between

seven and eight o'clock, passed under the bridge between the

station and the river. At this point the train was in a

stoppage and was moving very slowly. For the purpose of

this appeal we will refer to the location of the station as the

defendant's station of the Illinois and "North" and the other as

"north," it being divided by Kedvale avenue. The south part of the station was a long stone or concrete platform, while the north portion was made of lumber. The station proper was located north of Kedvale avenue. There was a stairway leading from the street level below up to the south portion of the station and another to the north platform.

About 8:30 on the morning of the day in question, defendant's regular suburban train stopped at the station to take on passengers; the train consisted of ten cars and a locomotive; a crew of six men, viz., the engineer, fireman, two collectors, the conductor and a rear brakeman, were in charge of the train. It was a clear, bright morning. No one testified as to how the accident occurred except the plaintiff. She was about five feet ten and one-half inches in her shoes, weighed about 196 to 200 pounds, and was in good health. Plaintiff testified that she had been accustomed to catch defendant's suburban train arriving at the Irving Park station between 8:30 and 8:45 o'clock every morning for about two years; that when she got to the foot of the stairs leading to the south platform the train was crossing the viaduct over Kedvale avenue; that she walked leisurely up the stairs; that it was about fifteen feet from the head of the stairs to the entrance to the car which was then standing and which she desired to board; that she started to get on the front end of the coach, took hold of the grab-rail with her right hand and as she put her foot on the step the train gave a lurch, started, and overbalanced her; that she fell under the train, the wheels passing over both her feet, necessitating the amputation of her right foot about six inches above the ankle, and the left foot was all removed except the back part of the heel. She testified: "As I started up the stairs the engine of the train was on the Kedvale viaduct, just coming over the viaduct. I did not get up to the top of the stairs before the train stopped.*** When the train started I had just stepped one foot up on the first step

"North", it being divided by certain systems. The main part of the station was a long stone or concrete structure, while the north portion was made of lumber. The station proper was located north of the main structure. There was a stairway leading from the street level below up to the south portion of the station and another to the north platform.

About 6:15 on the morning of the day in question, defendant's counsel mentioned train stopped at the station to take on passengers; the train consisted of ten cars and a locomotive; a crew of six men, viz., the engineer, fireman, two collectors, the conductor and a rear brakeman, were in charge of the train. It was a clear, bright morning. As was testified to by the accident occurred except the difficulty. The car about five feet ten and one-half inches in rear wheel, weighed about 150 to 200 pounds, and was in good health. Plaintiff testified that she had been accustomed to catch defendant's suburban train arriving at the Irvington station between 6:30 and 6:45 o'clock every morning for about two years; that she was at the foot of the stairs leading to the south platform the train was crossing the viaduct over Red Bank Avenue; that she walked leisurely up the stairs; that it was about fifteen feet from the head of the stairs to the entrance to the car which was then standing and which she failed to notice; that she started to get on the train and at the same time, took hold of the rail with her right hand and as she put her foot on the step the train gave a lurch, started, and overbalanced her; that she fell under the train, the wheels passed over both her feet, necessitating the suspension of her right foot about six inches above the rails, and the left foot was all removed except the heel part of the foot. She testified: "As I started up the stairs the engine of the train was on the Red Bank viaduct, that morning over the viaduct. I did not get up to the top of the stairs before the train stopped. When the train started and that stopped and that was the last of it."

of the coach and was pulling my body up when she was over-balanced. And further, "When I was going up the stairs there were other people on the station platform. When I got to the top of the steps there were other people getting on the train. I do not remember of seeing other people off the train on the platform. All of the people I saw when I got to the top of the stairs were in the act of getting on the train;" that she walked leisurely from the top of the stairway to the entrance of the car; that there was no brakeman at the place where she tried to board the car; that she didn't see any train man there until after the accident; that there were ^{no} other people on the stairs at the time she was ascending them.

The fireman, the two collectors, the conductor and the rear brakeman all testified. None of them saw plaintiff until after the accident. All of these witnesses testified that when the train stopped the two collectors, the conductor and the rear brakeman got off the train, as was their custom, and stood on the platform where the passengers were boarding the train, the front collector near the forward cars, then the conductor about the middle of the train, the rear collector a few cars back, and the brakeman at the rear end. The forward collector and the conductor were on the platform south of Kedvale avenue, the other collector and the brakeman were on the north platform. About 110 to 112 passengers boarded the train from the north platform and about 10 or 12 passengers from the south platform. Each of these four witnesses gave testimony to the effect that all of them stood on the platform until all passengers had boarded the train; that then the brakeman at the rear signaled by raising his arm to the rear collector, indicating that the platform was clear at his end of the train; this collector in turn gave a like signal to the conductor, the conductor then signaled the forward collector and he in turn signaled the fireman, who was on that side of the locomotive, who advised the engineer that all were on board and the engineer then started the train.

at the camp and was rolling my body against the wall when
 balanced. And further, when I was looking at the window I saw
 other people on the station platform. When I saw the man of
 the stone there were other people sitting on the train. I was not
 however of seeing other people all the time on the platform.
 All of the people I saw when I sat on the top of the stone were
 in the act of getting on the train; and the window looking from
 the top of the platform to the entrance of the train that was
 on platform at the time when the first of them got on. That was
 all I saw any train was there until after the accident; that there
 were other people on the train at the time the accident took place.
 The witness, the two collectors, the conductor and the
 train driver were all testified. Some of them say distinctly that after
 the accident, all of these witnesses testified that when the train
 started the two collectors, the conductor and the train driver were
 all the train, as was their duty, and that on the platform they
 the passengers were looking for the train, the first collector went
 the lowest side, then the conductor went the middle of the train
 the rear collector a few cars back, and the trainman on the rear
 end. The forward collector and the conductor were on the platform
 again at Leland station, the third collector and the trainman were
 on the north platform. There is in the passenger train
 train from the north platform and there is in the passenger train
 the south platform. Some of these facts are known to all
 to the effect that all of them stood on the platform until all
 passengers had loaded the train; that after the platform at the
 rear of the train by looking at the first collector, the
 fact the platform was clear of all of the train; that collector
 in turn gave a line signal to the conductor, the conductor then
 signaled the forward collector and he in turn signaled the trainman,
 who was on the side of the locomotive, and signaled the engine
 that all were on board and the engine then started the train.

Each of these four witnesses testified that each of them saw all of the signals and that all passengers were aboard the train before the first signal was given. Each of them also testified that they did not see the plaintiff until after the accident. The rear collector further testified that after the train started up he stepped on the platform next to the last coach and "I looked out the side again and saw a man give a signal to stop;" that this man was on the south platform; "at that time I saw a woman lying down between the platform and the coach;" that when he first saw the woman the last cars of the train were going by the depot which was beside the north platform; that he was then about three car lengths from her; that he then reached up, pulled the whistle cord twice to indicate to the engineer to stop right away; that he then grabbed the emergency cord and stopped the train himself; that when the train stopped the rear end of the last coach was about two car lengths east of Kedvale viaduct; and that he jumped off and ran back and helped plaintiff.

The evidence further shows that as soon as the train was stopped, a number of the train men and some of the passengers went to plaintiff's assistance and she was taken to the hospital. There was testimony to the effect that immediately after plaintiff was injured she said that she had run to get on the train which was moving, and there was further evidence to the effect that she had again stated this when she was taken into the hospital, to one of the nurses whose duty it was to get such information. Other witnesses who were present at the time of the accident, and at the hospital, gave testimony to the effect that plaintiff made no such statement, and plaintiff herself denied making any such statement.

The defendant contends that the declaration did not state a cause of action and therefore its motion in arrest of judgment should have been sustained; in support of this counsels' argu-

Each of these four witnesses testified that none of them saw all of the signals and that all passengers were aboard the train before the first signal was given. Each of them also testified that they did not see the plaintiff until after the accident. The first collector further testified that after the train started up he stepped on the platform next to the last coach and "I looked out the side again and saw a man give a signal to stop;" that this man was on the south platform; "at that time I saw a woman lying down between the platform and the coach;" that when he first saw the woman the last cars of the train were going by the depot which was beside the north platform; that he was then about thirty feet from the platform; that he then reached up, pulled the woman's coat down to indicate to the engineer to stop that coach; that as he then grabbed the emergency cord and stopped the train himself; that when the train stopped the rear end of the last coach was about two car lengths east of Redgate viaduct; and that he jumped off and ran back and helped plaintiff.

The evidence further shows that as soon as the train was stopped, a number of the train men and some of the passengers went to plaintiff's assistance and she was taken to the hospital. There was testimony to the effect that James Kelly, after plaintiff was injured she said that she had run to get on the train which was moving, and there was further evidence in the record that she had again asked Kelly when she was taken into the hospital, to get off the train because Kelly it was to get such information. Other witnesses who were present at the time of the accident, and at the hospital, gave testimony to the effect that plaintiff made no such statement, and plaintiff herself testified making no such statement. The defendant contends that the testimony of the

state a cause of action and therefore the motion is denied. It is noted that the court should have been satisfied in answer to this question, when

ment, as we understand it, is that there was no allegation in any of the counts that the defendant had knowledge of plaintiff's position at the time it started its train. The negligence charged in each of the counts was that defendant started its train while plaintiff was in the act of boarding it. We think this was sufficient. Obviously it was the duty of the defendant to exercise care to see that passengers had time to board the train before the train started. The train had stopped at a regular station to receive passengers, and if it was negligently started before all had boarded it, obviously the defendant would be liable for damages to any passenger who was in the exercise of ordinary care for his own safety.

It is also contended that the plaintiff failed to prove any negligence on the part of defendant, and that the verdict is against the manifest weight of the evidence. We have above set forth the substance of the evidence and if plaintiff's version was accepted by the jury, then the jury would be warranted in finding that plaintiff was not given sufficient time to board the train.

At the request of the defendant the jury were specifically instructed that unless plaintiff had proved by a preponderance of the evidence that the train was standing still at the time she tried to board it, their verdict should be for the defendant. By another instruction given at defendant's request they were told that if they found from the evidence "the train in question" had started to move and was moving at the time Mrs. Whiteley tried to get on it, "your verdict must be not guilty." The jury having returned a verdict in plaintiff's favor, it is obvious that they found the train was standing still at the time plaintiff tried to board it.

In view of the evidence we are also of the opinion that we would not be warranted in disturbing the verdict of the jury to the effect that plaintiff was in the exercise of due care

for her own safety and that the defendant was negligent, on the ground that it was against the manifest weight of the evidence. We think whether the plaintiff was in the exercise of due care and the defendant guilty of negligence as charged, were questions for the jury.

Complaint is also made that the argument to the jury by counsel for plaintiff, was improper. That part of counsel's argument complained of is as follows:

"Now, I told you I would tell you how this thing happened, and I am going to tell you how it happened and why it happened, in just a word. The railroad company here, if they pay a judgment in this case, will pay it because they are the victims of their own carelessness in this respect: First, they build their accommodations for the public in such a manner that they invite an accident. Kedvale avenue is a public street in the City of Chicago. On that public street is a staircase, unobstructed, no wicket, no gate, nothing to impede the progress of a person from the street onto the platform."

We think there is nothing in this argument that would warrant us in disturbing the verdict and judgment. The only issue in the case was whether the defendant had started its train without giving plaintiff sufficient time to board it. This was stated specifically in the instructions. We think the jury understood this vital point clearly. There is nothing in the argument complained of that would warrant the conclusion that plaintiff was basing her right to recover, in part at least, on the fact that the station was improperly constructed. Counsel was only calling the attention of the jury to the surrounding circumstances.

A further contention is made that the court erred in giving two instructions at plaintiff's request and in refusing one requested by defendant. The first instruction complained of instructed the jury that "a common carrier of passengers is required to exercise the highest degree of care consistent with the practical operation of its railroad and the means of conveyance adopted for the safety of its passengers." And it is said that this assumed that at the time of the accident plaintiff was a passenger and that it also emphasized the argument of plaintiff's counsel to the effect

that the defendant was guilty of negligence in not obstructing its stairs with gates. Plaintiff had a ticket and was in the act of boarding defendant's train at its station, and therefore the relation of carrier and passenger existed. I. C. R. R. Co. v. Treat, 179 Ill. 570. What we have already said with reference to counsel's argument disposes of the other objection to this instruction.

The other instruction complained of was as follows:

"The court instructs the jury that the plaintiff was not required to exercise the highest degree of care for her own safety, but was only required to exercise ordinary care."

We think this instruction stated a correct rule of law and was applicable to the facts in the case. The refused instruction requested by the defendant stated that the jury were instructed

"that as a matter of law in this case there is no evidence reasonably tending to prove that at the time plaintiff sustained her injury the relation of carrier and passenger existed between her and the defendant railway company."

From what we have said it is obvious that this instruction was properly refused.

At the close of the plaintiff's case the court, on motion of plaintiff and over defendant's objection, permitted plaintiff to increase the ad damnum from \$30,000 to \$50,000. We know of no reason why this is improper, and especially so since no complaint is made that the verdict and judgment are excessive.

The judgment of the Circuit court of Cook county is affirmed.

AFFIRMED.

McBurely, P. J., and Hatchett, J., concur.

33910

PRENTIS HARRIS,
Plaintiff in Error,
vs.

STAVEN AUTO SERVICE COMPANY,
a Corporation,
Defendant in Error.

45a
HARBOUR TO MUNICIPAL COURT
OF CHICAGO.

256 I.A. 602³

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in the Municipal court of Chicago to recover the value of an automobile claimed to be owned by him. He filed a statement of claim which in substance is the same as a declaration in an action of trover, wherein he alleged that he casually lost the automobile and that afterwards it came into the possession of the defendant by finding it, etc.

The defendant was served and filed its affidavit of merits denying liability and setting up that the automobile in question was damaged in a wreck and was obstructing the public streets of Chicago, where it was found by police officers of the City, who, acting in their official capacity, removed the damaged automobile to the defendant's garage; that the license number of the automobile revealed the fact that it belonged to Dunlap Harris; that shortly after the car was brought in to the defendant's garage the wife of Dunlap Harris called at defendant's place of business and ordered it to repair the car; that afterwards the repairs were made, Mrs. Harris called, paid the bill and received the car; and that some time thereafter plaintiff claimed to be the owner of the automobile when it was brought into the garage.

Afterwards, on March 22, 1929, the cause came on for trial, the defendant not appearing. There was an ex parte hearing and a finding and judgment in plaintiff's favor of \$562. Plaintiff waited more than thirty days, then took out an execution and two days later it was returned by the bailiff, no property found, and some time thereafter an affidavit of garnishee summons was filed.

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DATE 11-19-2001 BY 60322 UCBAW

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STUDY OF THE ANTI-CD4 ANTIBODY RESPONSE IN HIV-1 INFECTION

James E. Gurnea and it was a signed bill in

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The process of urbanization is the movement of people from rural areas to urban areas. This movement is caused by a number of factors, including the search for better living conditions, the desire for education, and the need for employment. The process of urbanization has led to the growth of large cities and the decline of small towns. This has had a number of effects on the economy and society. One of the most important effects is the concentration of wealth and power in the hands of a few people. This has led to the development of a class system, in which a small group of people at the top of the hierarchy controls the majority of the resources. This has also led to the development of a culture of materialism, in which the pursuit of wealth and power is seen as the primary goal of life. The process of urbanization has also led to the development of a culture of conformity, in which people are expected to conform to the norms and values of the majority. This has led to the suppression of individuality and the loss of traditional values. The process of urbanization has also led to the development of a culture of violence, in which the use of force is seen as a legitimate means of achieving one's goals. This has led to the development of a culture of crime, in which the commission of crimes is seen as a way of gaining status and respect. The process of urbanization has also led to the development of a culture of corruption, in which the abuse of power is seen as a way of getting ahead. This has led to the development of a culture of dishonesty, in which the use of lies and deception is seen as a necessary part of life. The process of urbanization has also led to the development of a culture of competition, in which the desire to win is seen as the primary motivation for action. This has led to the development of a culture of selfishness, in which the interests of the individual are seen as more important than the interests of the community. The process of urbanization has also led to the development of a culture of materialism, in which the possession of material goods is seen as a sign of success. This has led to the development of a culture of consumerism, in which the purchase and consumption of goods is seen as a way of achieving happiness. The process of urbanization has also led to the development of a culture of individualism, in which the individual is seen as the primary unit of society. This has led to the development of a culture of self-interest, in which the pursuit of one's own interests is seen as the primary goal of life. The process of urbanization has also led to the development of a culture of conformity, in which people are expected to conform to the norms and values of the majority. This has led to the suppression of individuality and the loss of traditional values. The process of urbanization has also led to the development of a culture of violence, in which the use of force is seen as a legitimate means of achieving one's goals. This has led to the development of a culture of crime, in which the commission of crimes is seen as a way of gaining status and respect. The process of urbanization has also led to the development of a culture of corruption, in which the abuse of power is seen as a way of getting ahead. This has led to the development of a culture of dishonesty, in which the use of lies and deception is seen as a necessary part of life. The process of urbanization has also led to the development of a culture of competition, in which the desire to win is seen as the primary motivation for action. This has led to the development of a culture of selfishness, in which the interests of the individual are seen as more important than the interests of the community. The process of urbanization has also led to the development of a culture of materialism, in which the possession of material goods is seen as a sign of success. This has led to the development of a culture of consumerism, in which the purchase and consumption of goods is seen as a way of achieving happiness. The process of urbanization has also led to the development of a culture of individualism, in which the individual is seen as the primary unit of society. This has led to the development of a culture of self-interest, in which the pursuit of one's own interests is seen as the primary goal of life.

1. 姓名: 李 明
 2. 性别: 男
 3. 年龄: 25
 4. 职业: 教师
 5. 籍贯: 湖南长沙
 6. 民族: 汉族
 7. 婚姻状况: 已婚
 8. 学历: 本科
 9. 学位: 硕士
 10. 职称: 副教授
 11. 工作单位: 湖南大学
 12. 联系电话: 13808888888
 13. 电子邮箱: liming@hnu.edu.cn
 14. 身份证号: 430106199801010001
 15. 银行卡号: 62284801010101010101
 16. 支付宝账号: 12345678901234567890
 17. 微信账号: 12345678901234567890
 18. 其他信息: 无

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1. The first part of the paper is devoted to the study of the properties of the function $f(x)$ defined by the equation

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What exactly was the purpose of the investigation?

1940-1941

8-7-60

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(continued)

entirely new and different from the old one.

14. *How often do you use the following facilities?*

Shortly thereafter the defendant learned that the judgment had been entered against it; a few days afterwards the defendant made a motion that the judgment be opened up and it be given leave to defend. In support of this motion a verified petition under section 21 of the Municipal Court act was filed, in which it is alleged that on March 13, 1929, a notice was served by counsel for plaintiff on counsel for the defendant, that on the next morning March 14th, counsel for plaintiff would appear before a judge of the Municipal court and ask that the defendant's affidavit of merits be stricken for insufficiency; that thereupon counsel for defendant telephoned plaintiff's counsel that he was engaged in a trial before another judge so that it would be impossible for him to attend the motion the following morning. Thereupon counsel for plaintiff agreed that nothing would be done on the motion and there was a discussion between counsel to the effect that plaintiff's counsel desired to test the sufficiency of defendant's affidavit of merits, as to whether it set up a legal defense and that the matter might be disposed of on the pleadings without the necessity of a trial; that counsel for plaintiff then said he would again serve notice at a later date and bring the matter up on the contested motion calendar; that if this could not be done before March 22nd, the date on which the case was set, counsel for plaintiff would have the case continued; that counsel for defendant, relying on this, paid no more attention to the matter; that he never received any other notice and the first intimation that judgment had been entered against defendant was long after the lapse of thirty days.

Plaintiff filed a document which is designated a counter petition, in which he admits substantially the allegations of the petition sworn to by counsel for defendant as above set forth, except he stated that he did not agree to have the case continued

directly thereafter the defendant is found that the defendant had
 been entered against it; a few days afterwards the defendant was
 a motion and the judgment be entered so that it be given leave to
 defend in support of the motion a verified petition under sec-
 tion 21 of the Kentucky Court not was tried, in which it is al-
 leged that on March 13, 1917, a notice was served by counsel for
 plaintiff on counsel for the defendant, that on the next morning
 March 14th, counsel for plaintiff would appear before a judge of
 the Kentucky court and ask that the defendant's affidavit of
 service be returned for irregularity, and therefore counsel for
 defendant telephoned plaintiff's counsel that he was engaged in a
 trial before another judge so that it would be impossible for him
 to attend the motion the following morning. Thereupon counsel for
 plaintiff advised that nothing would be done in the motion and there
 was a discussion between counsel for both sides plaintiff's
 counsel desired to have the affidavit of defendant's affidavit
 of service, as to whether it was a legal defect and that the
 matter might be disposed of on the following morning the necessity
 of a trial; that counsel for plaintiff then told the judge
 gave notice at a later date and tried the matter up on the con-
 tested motion affidavit; that it was found that the motion was
 overruled, the case was set for trial on the 17th day of April
 1917 and the case continued. That counsel for plaintiff
 relying on this, said no more appeared in the matter; that he
 never received any other notice and the trial testimony was given
 and that was entered against defendant who long after the issue of
 thirty days.
 Plaintiff filed a demand which he designated a motion
 petition, in which he asked essentially the dissolution of the
 relation which he by contract had entered on March 14, 1917,
 except he stated that he did not want to have the case continued

beyond March 22nd, the date on which it was set for trial, but on the contrary stated to counsel for defendant that if the motion to strike the defendant's affidavit of merits for insufficiency was not disposed of before March 22nd, it would be heard on that date and in case the motion was denied counsel for plaintiff expected the case to go to trial.

Upon consideration of the petition and counter petition the court on June 1st entered an order that the judgment stand as security; that the execution be stayed and the defendant given leave to defend on the trial of the case, the defendant to pay costs. On June 20th an order was entered wherein it is stated that plaintiff "Upon special appearance" moved the court to vacate the order of June 1st, which motion was overruled. On the same day another order was entered on motion of the defendant that the plaintiff file a more specific statement of claim within 10 days, and that defendant be given 10 days thereafter to file an affidavit of merits.

Counsel for plaintiff paid no attention, apparently, to this order and on August 6th following, on motion of defendant, the suit was dismissed for failure of the plaintiff to file the more specific statement of claim as ordered. Afterwards plaintiff sued out this writ of error.

The defendant contends that the court had no jurisdiction to open up the judgment and that the order purporting to do so was void because more than 30 days had elapsed since the entering of the judgment. Section 21 of the Municipal Court act, chap. 37, Cahill's 1929 Statutes, provides that there shall be no stated terms of the Municipal court; that every judgment final in its nature shall not be opened up after the expiration of 30 days from the date of the entry of the judgment, except "upon appeal or writ of error, or by a bill in equity, or by a petition to said municipal

court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity."

The petition filed by counsel for the defendant above referred to set up facts which, if believed by the court, would warrant the finding that there was an agreement between counsel that nothing would be done towards the hearing of the case until plaintiff's motion to test the sufficiency of defendant's affidavit of merits was disposed of, and that the agreement had been violated. The petition further set up that defendant had a meritorious defense as disclosed by its affidavit of merits then on file.

In these circumstances, we think the trial judge was warranted, under section 21 of the Municipal Court act, in opening up the judgment and giving leave to the defendant to have a trial on the merits. We are also of the opinion that the court was warranted in ordering plaintiff to file a more specific statement of claim. One of the purposes of the Municipal Court act was to do away with technical pleadings and to require the parties to state their cause of action and their defense in plain, simple language. The plaintiff having refused to comply with the order of court, there was nothing to do but to dismiss the suit.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

McSurely, P. J., and Hatchett, J., concur/

located, and within 48 hours of a full inspection.
The first week, which would be devoted to the work of the
court system, would be followed by a period of 12 months

Very respectfully,
 Yours truly,
 [Signature]

The above information was obtained from a review of the files of the Department of the Interior, Bureau of Land Management, and the Bureau of Reclamation, and is being furnished to you for your information.

[illegible]

1856-1857

U.S. Department of Health and Human Services

33948

PAUL D. TONY,
Defendant in Error,

vs.

THE UNION OF ROMANIAN BENEFICIAL
AND CULTURAL SOCIETIES OF AMERICA,
Plaintiff in Error.

WARRANT TO THE SUPERIOR COURT
OF COOK COUNTY.

256 I.A. 602⁴

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this writ of error the defendant seeks to reverse an order entered by the Superior court of Cook county, overruling its motion to set aside a default and judgment and for leave to plead.

The record discloses that on September 17, 1928, plaintiff brought an action of assumpsit against the defendant. The summons which was returnable to the November term was served October 19, 1928, and on November 2nd plaintiff filed his declaration, which was the ordinary printed form of the common counts for money loaned, goods, wares and merchandise sold and delivered, etc. December 8th following, no appearance having been entered by the defendant, it was defaulted and judgment entered against it for \$3721.40. On January 2, 1929, which was within the term at which the judgment was entered, the defendant entered its motion to vacate and set aside the default and judgment and for leave to plead. The matter was continued and was passed upon March 16, 1929, when the motion was denied. An appeal was prayed and allowed to this court.

An affidavit was filed in support of defendant's motion to which were attached and made a part of the affidavit several exhibits, being letters which passed between counsel for plaintiff and counsel for the defendant, who was a practicing attorney living in Cleveland, Ohio. The affidavit was made by defendant's Cleveland counsel, from which it is made to appear that he had been general counsel for the defendant for some time prior to the institution of the suit; that immediately after the suit was begun a number of

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REASON: 60322 UCBAW/BAW

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THE UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D. C. 20250

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letters passed between himself and plaintiff's counsel in Chicago. From these letters it appears that counsel for both parties were endeavoring to negotiate a settlement of the law suit, and it further appears that the Cleveland counsel was unfamiliar with the practice in Chicago and made a number of inquiries concerning the same, to which plaintiff's counsel replied. We think it would serve no useful purpose to analyze these letters, but it is sufficient to say that they indicate entire good faith on the part of counsel in Cleveland in an endeavor to settle the suit, and that he was of the opinion that the negotiations were still pending when he was advised that judgment by default had been entered against the defendant. The affidavit also tended to show that the defendant had a meritorious defense.

The motion to vacate and set aside the judgment and default having been made at the term at which the judgment was entered, we think it should have been allowed. It is the practice in our courts to be liberal in setting aside defaults and judgments when the motion to do so is made at the term in which the judgment is entered, where it appears that to do so will promote justice.

The order of the Superior court of Cook county is reversed and the matter remanded for further proceedings not inconsistent with the views herein expressed.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

the following is a summary of the information received from the various sources mentioned above:

[illegible]

The order of the Director of the Bureau of the Census is as follows:

0-71759

33782

WALTER L. GITHENS,
Appellant,

v.

PASSEN SECURITIES, Inc.,
et al.,
Defendants,

ILLINOIS HOME FINANCE
CORPORATION,
Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

256 I.A. 602⁵

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a chancery proceeding in which the Chicago Title & Trust Company was appointed both special and general receiver over the interests of Leuffgen Auto Sales, Inc., a corporation, in and to the automobiles and securities mentioned in the bill of complaint, and general receiver of the property of John H. Leuffgen, trading in the name of said corporation. Appellee came into the case upon a petition for reclamation of thirteen old automobiles in possession of the Leuffgen Auto Sales, on which it claimed a lien by chattel mortgage to secure a note for money loaned to said Leuffgen, doing business as aforesaid, on which there was still due \$1625.00 and interest. It was claimed that said lien was a first and prior lien on said thirteen automobiles.

Thereafter an order was entered for the sale of the assets held by the receiver, and a sale was had and approved. On hearing the issues raised by the petition for reclamation the court found that appellee had a lien on all of the assets in the hands of the receiver and entered a decretal order in favor of

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2572

WALTER L. STEINER,
Applicant.

W. L. STEINER, Inc.,
Tolansville.

ILLINOIS BANK SERVICE
CORPORATION,
Appellee.

WALTER L. STEINER,
Applicant.

2572 A. 008

IN THE SUPREME COURT OF THE STATE OF ILLINOIS
BETWEEN THE OPINION OF THE COURT.

This is a summary proceeding in which the Illinois title
a trust company was appointed as a special and general receiver over
the interests of Leighton, his heirs, and a corporation, in and
to the said real estate and securities mentioned in the bill of complaint,
and general receiver of the property of John M. Leighton, trustee
in the name of said corporation. Appellee came into the case upon a
petition for vacation of said trust and appointment as receiver
of the said real estate and securities in which it claimed a lien or interest
and sought to secure a writ for recovery of said property, being
indicated as follows: In which case it was held that the said
interest. It was claimed that said lien was a first and prior
lien on said certain real estate.

Thereafter an order was entered for the sale of the
certain real estate by the receiver, and a sale was had and conducted
on hearing the same being by the receiver for vacation of the
court found that appellee had a lien on all of the same in the
hands of the receiver and entered a judgment order in favor of

appellee against the receiver for the balance due on said note, and interest, or for any part thereof.

Various points are urged for reversal which, in view of an agreement between appellant and appellee in open court, need not be considered. It appears that there were forty-one automobiles of said Sales Company taken possession of by the receiver and sold pursuant to the order of court, and that the aggregate sum the forty-one automobiles brought was \$2648.58. The order appealed from gives appellee a prior lien for the full amount of its claim on the entire proceeds of sale. Conceding that it had a prior lien as to the thirteen cars, it is apparent that as against other creditors it did not have one as to the twenty-eight cars. The court, therefore, should, in view of appellee's prior lien on the thirteen cars, have directed a separate sale of them. In the absence of any proof of the relative value of the thirteen cars on which the lien was claimed, and the twenty-eight cars, it is impossible to determine from the record what proportion of the proceeds of the sale appellee is entitled to under its prior lien. Only one creditor, complainant Githens, has appealed from the order aforesaid.

It is recognized by appellant and appellee that to reverse the order appealed from and to remand the cause to take evidence as to what was the relative value of the two sets of automobiles included in the receiver's sale and represented by said proceeds, would, at this time, entail considerable expense to obtain any reliable proof on the subject in view of the lapse of time since the sale. But unless agreed upon a determination of their relative value is necessary as a basis of an order fixing appellee's relative share of the proceeds on the theory of having a prior lien thereon.

To save such expense, and for the purpose of terminating the litigation involved on this appeal, it is agreed in open court that the decretal order shall be reversed, at appellee's costs, and the cause remanded with directions to modify the same so as to allow appellee a prior lien on the proceeds of the sale to the extent of \$700.00, and directing the receiver to pay over said sum to appellee in satisfaction of its lien thereon.

Accordingly the decretal order will be reversed and the cause remanded for a modification of the decree as herein stated.

REVERSED AND REMANDED WITH DIRECTIONS.

Scanlan and Gridley, JJ., concur.

To have such a power, and for the purpose of determining
the liability involved in this appeal, it is agreed in open court
that the board of directors shall be deemed, as appellee's counsel,
and the same counsel with disinterest to modify the same so as to
allow appellee a prior lien on the proceeds of the sale to the
extent of \$100,000, and allowing the balance to pay over said
sum to appellee in satisfaction of the lien claimant.
Accordingly the board of directors will be reversed and the
same reversed for a modification of the terms of certain articles.
REVEREND THE HONORABLE THE COURT.

James and Gail, 111. 1900.

33587

IN RE ESTATE OF EDWARD
W. WALLACE, Deceased,

Appellant,

v.

ANN ENGEL,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

256 I.A. 603

Opinion filed March 5, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion
of the court.

Ann Engel, complainant, filed her claim in the Probate Court of Cook County August 31, 1928, alleging that the deceased, Edward W. Wallace, a short time before his death gave to her thirteen \$1,000.00 bonds of the South Western Gas Light & Power Company; four \$1,000.00 bonds of the Consolidated Power and Light Company of South Dakota; four \$500.00 bonds of the South Western Gas Light and Power Company; one \$1,000 bond of the Belden Hotel Company; that she placed said bonds in a safety deposit box and, after the death of the deceased, found that the said bonds, with the exception of the Belden Hotel Company bond, had been taken from said deposit box and were listed as part of the assets of the estate of the deceased. Prays an order on executrices to turn over said bonds or to pay the fair market value thereof. The claim was allowed in the Probate Court and an appeal taken to the Circuit Court of Cook County. The cause was tried in the Circuit Court by the court without a jury, and resulted in a finding in favor of the claimant, and assessing her damages at \$23,186.61. Judgment was entered on the finding, from which judgment an appeal was taken to this court.

Ronald M. Banville, a witness for claimant, testified that he was the vault manager for the City State Safe Deposit Company, and that he knew Edward W. Wallace in his lifetime; that Wallace had a safety deposit box in the vault prior to June 15, 1935. He identified the lease to the box in question and a receipt acknowledging the payment of \$2.50 by Ann Engel for the deposit box 3769, from June 15, 1935 to June 15, 1936. The lease in question was signed by Ann Engel and E. W. Wallace.

Lillian Long, testified that she was a nurse and attended the deceased for five days prior to his death. She asked the deceased if he knew he was very sick and was going to die, and he replied in the negative. He asked for Miss Engel and said he was sorry he was unable to arrange the trust fund, and witness also heard him tell Miss Engel to go ahead and renew the lease and that he would take care of the trust fund as soon as he was out of the hospital.

Guilford B. Davis, testified that he was a dentist and had known the deceased for some years; that he came frequently to his office and at one time he told him that he had given Miss Engel \$20,000.00 in bonds and intended to add more to it; that he intended to have it put in trust for her. Stated further that he had taken the bonds out with the exception of one, but had not yet made the arrangements concerning the trust. Witness said that he noticed Wallace was a very sick man. This conversation was July 14, 1935. He also stated that he knew Miss Engel and had done some work for her in August, 1935, but not since.

Adele Engel testified that she was the mother of Ann Engel, the claimant, and knew Wallace and that in June,

1925, he asked her to write to her daughter, Ann Engel, and have her come home; that he was not feeling well and wanted to make provision for her; that she heard Wallace tell the claimant that he was going to give her \$20,000.00 in bonds and for her to meet him the next morning at the City State Bank, and to be there promptly at 9 o'clock. He later told the witness that he had given the claimant \$20,000 and thought he had better add more to it and put it in a trust fund, so that she could have a sufficient income. Later she heard the said Wallace tell the claimant that he was going to take the greater part of her bonds and add more to them and create a trust fund, and asked claimant for the key to the safety deposit box, and that she gave it to him.

Rose Lavin testified that she knew Edward Wallace and Ann Engel and that in the month of June in 1925, at her home, when they were both present, he stated that he had given Miss Engel \$20,000 in bonds and that later, in August, he had stated that Miss Engel had created a trust with the bonds he had given her.

Mary Guillum testified that she knew the claimant and the deceased and had for sometime prior to August, 1925; that on June 14, 1925, at the home of Miss Engel and in the presence of her mother, Wallace told claimant to meet him at the City State Bank, as he wanted to give her \$20,000.00 in bonds; that she went to the bank with Miss Engel the next morning and there he stated that he wanted her, the claimant, to get a safety deposit box; that claimant thought it was better to hold the box jointly, but that he objected; that she finally persuaded him and that both of them registered on the card; that Mr. Wallace got his own safety deposit box and

1915, he asked her to write to her mother, and asked her to have her name changed; that he was not telling her well and honest to make provision for her; that the bank balance fell the statement that he was going to give her \$50,000.00 in bonds and for her to send him the next morning at the city hall, and to be there promptly at 2 o'clock. He later told the witness that he had given the witness \$50,000.00 and that he had better not move as it was not in a trust fund, as that she could have a sufficient income. Later the next day the witness told the witness that he was going to give the executor part of her bonds and that he was to take and transfer a trust fund, and asked statement for the key to the safety deposit box, and that she gave it to him.

Now this witness told the witness that she had told the witness and her lawyer that in the month of June in 1915, at her home, when they were both present, he stated that he had given her \$50,000 in bonds and that later, in August, he had stated that this legal had created a trust with the bonds he had given her.

Now this witness testified that she knew the witness and the deceased and that her mother, when he was in 1915, that on June 14, 1915, at the home of this legal and in the presence of her mother, witness told statement to her mother that she was going to give her \$50,000.00 in bonds; that she went to the bank with this legal and next morning and there he stated that he wanted her, the witness, to get a safety deposit box; that statement occurred to her before he held the box finally, but that he objected; that she finally purchased the box and that she of this statement on the bank; that she, witness, had her own safety deposit box and

took out \$20,000.00 in bonds and asked claimant to make a list of them, which she did; that there were thirteen \$1,000.00 bonds of the Gas Light & Power Company of Texas; four \$500.00 bonds of the same company; four \$500.00 bonds of the Consolidated Light & Power Company of South Dakota; one \$1,000.00 bond of the Belden Hotel; that at the time the bonds were given to Miss Engel, he said, "These bonds are yours". They then went upstairs and there he handed to claimant both keys to the deposit box. The witness further stated that she was with Miss Engel on August 23, 1925, when she opened the deposit box and that there was but one bond left.

The record of the Safety Deposit Vault Company showed that but two visits were made after the obtaining of the original lease; one by Wallace July 10, 1925, and the other by Ann Engel August 23, 1925. At this last time the witness Gillum testified she was present.

The inventory of the estate showed that there were on hand in the estate as of February 24, 1926, thirteen \$1,000.00 bonds of the Southwestern Gas Light and Power Company of Texas; four \$1,000.00 bonds of the Consolidated Power & Light Company of South Dakota.

This was all the evidence heard or considered by the trial court.

Our attention is directed by counsel for the plaintiff to but two propositions; first, the gift was a gift causa mortis and was revoked by the donor during his lifetime; second, even though it might be held to be a gift inter vivos, the evidence of delivery is not of such a clear and convincing character as to warrant a finding of an absolute and unconditional delivery. A gift causa mortis must be made by the donor in the belief

that he is about to die and to take effect only in the event of his death and must be accompanied by an actual delivery of the subject of the donation. He may be ill and suffering at the time, but there must be a well defined belief in his own mind that he does not expect to recover from the present illness.

From the evidence in the case, it would appear that, even during the last few days of his illness, he told his nurse, the witness Long, that he did not know that he was going to die, and there is no evidence in the record to the effect that his belief was otherwise. The gift was made June 15th and he died August 22nd, two months after the happening of the events upon which this action is predicated. Telford v. Patton, 144 Ill. 611.

In order to constitute a delivery inter vivos, it is essential that the gift take effect immediately and not at some future time; that there be a delivery of the thing in question and that there be a change of possession so as to put it out of the power of the donor to repossess himself of the thing given.

From the facts in evidence it is clear that the bonds were actually delivered to the claimant in the vaults of the City State Bank; that there was an actual delivery and a complete change of possession. This is evidenced by the testimony of the witness Mary Gillum, and borne out by statements made by other witnesses in the case, showing his intention to make the gift. There is no contradictory evidence in the record, and there is no evidence from which it could be said that the relationship between them was of such character as to cast a doubt upon the intention of the donor. While the deposit box was taken in the name of both, the keys were

that he is about to die and to leave behind only in the event of his death and may be accompanied by an actual delivery of the subject of the donation. He may be ill and suffering at the time, but that must be a well defined illness in his day and that is not an excuse to recover from the present illness.

From the evidence in the case, it would appear that even during the last few days of his illness, he told his nurse, the witness long, that he did not know that he was going to die, and there is no evidence in the record to the effect that his illness was operative. The gift was made long and he died August 1911, two months after the making of the gift upon which this action is brought. Deborah v. Debra. 144 Ill. 411.

In order to constitute a delivery under this will, it is essential that the gift take effect immediately and not at some future time; that there be a delivery of the thing in question and that there be a change of possession so as to put it out of the power of the donor to repossess himself of the thing given.

From the facts in evidence it is clear that the words were actually delivered to the donee in the hands of the donor (the donor) and that there was an actual delivery and a change of possession. This is evidenced by the fact that many of the witnesses, who were not by themselves, but by other witnesses in the room, showed the intention to make the gift. There is no contradictory evidence in the record, and there is no evidence from which it could be said that the relationship between the donor and donee was such as to make a gift upon the basis of the donor's will. The gift was

given to claimant at the request of the deceased.

There is ample evidence in the record in our opinion to support the claim and we are fortified in our opinion by the fact that both the Probate Court and the Circuit Court on appeal, after hearing the witnesses and observing them while upon the stand, found the issues in favor of the claimant. There is no force in the proposition that immaterial or improper evidence was admitted, because the cause was tried by the court, without a jury, and under such circumstances, it is presumed that only competent and material evidence was considered by the court in arriving at its finding.

The fact that the bonds were taken from the deposit box by the deceased can not avail the estate, because of the expressed intention of the donor to the effect that it was not done for the purpose of depriving claimant of the title to said bonds, but in order to place them with other securities in a trust fund for her advantage.

After a review of the testimony in the cause, we see no reason for reversing the judgment and, for that reason, and the reasons expressed in this opinion, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

RYNER AND HOLDON, JJ. CONCUR.

given as evidence of the contents of the document.

There is no evidence in the record as to whether

to support the claim that the document is not genuine.

The fact that the document is not genuine is not

on appeal, and the document is not genuine.

While under the circumstances the issue is not at the moment

there is no issue in the present case that is material or important

evidence was admitted, because the same was given by the

court, and under such circumstances, it is

presumed that only material and material evidence was not

admitted by the court in the trial of the case.

The fact that the document is not genuine is not

for by the document and not by the court, and the

document is not genuine, and the document is not

not genuine for the purpose of the trial of the case

to said court, but in order to prove that the document

is a true copy of the original.

After a review of the evidence in the case, it

was no reason for finding the document not genuine.

and the evidence presented in this case, the judgment of

the court is affirmed.

JOSEPH R. BROWN,

JOSEPH R. BROWN, JR.,

33585

ELIZABETH SANDONA.

Appellee,

v.

JACOB LEWANDOWSKI,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

256 I.A. 603²

Opinion filed March 5, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

This is an appeal from a judgment of the Superior Court of Cook County in favor of Elizabeth Sandona, plaintiff, and against the defendant Jacob Lewandowski. The action was in trover for the conversion of a \$1,000.00 note and trust deed given to secure said note and was tried with a jury resulting in a verdict for \$1,180.00, the same being for principal and interest, and upon this verdict judgment was entered.

From the facts it appears that the plaintiff was the owner of a certain lot improved with a bungalow, which had been completed shortly before the giving of the note in question. On March 10, 1926, the plaintiff and her son John Savonitch and his wife, purchasers of the property; James Boulton, who was acting as a contractor's foreman in the construction of the bungalow; B. J. Prystalski, an attorney for the purchasers; and Domenico Gianotti and Antonio Steripga, workmen employed in the construction of the building, were present in the office of the defendant for the purpose of executing the necessary papers for the completion of the sale of the premises and the payment of such moneys or checks as were due.

of the report.

From the letter it appears that the plaintiff was
the owner of a certain lot bounded by a highway, which
was then owned and shortly before the giving of the note in
question. On March 10, 1906, the plaintiff and her son
John, deceased, and his wife, conveyed to the plaintiff, James
Kendall, who was acting as a confidential person in the
administration of the husband's estate; J. J. Hendricks, an attorney,
for the purpose; and James of said estate and another party,
others engaged in the construction of the building, were
present in the office at the time of the making of the mortgage.
We are using the foregoing facts for the completion of the story
of the transaction and the payment of such money as there may

J. J.

The defendant was to receive a note for \$1,000.00, secured by a trust deed, and this note and trust deed were turned over to the defendant at that time for the use of the plaintiff. Plaintiff testified, as did also her son, that she instructed the defendant to keep the note for her. Steripga testified that the defendant told the plaintiff that he would keep the mortgage in his safety box. Lewandowski, the defendant, testified that the plaintiff instructed him to turn the note and the trust deed over to Boulton, as he, Boulton, was acting for her and that, thereupon, he had her sign a certain document dated March 10, 1926, directed to him to deliver to Boulton the trust deed for \$1,000.00, as soon as the same was returned from the Torrens department. A receipt from Boulton was also introduced in evidence dated May 3, 1926, acknowledging receipt of the trust deed. Neither the order on Lewandowski to turn over the trust deed, nor the receipt of the same by Boulton, mentions the note.

Lewandowski at the time of the transaction, and for some time prior thereto, was a real estate broker and it was through his office that the deal was consummated. It becomes a question of fact as to whether or not Lewandowski held the note in question for the benefit of the plaintiff, and in this respect was a bailee who, without consulting the plaintiff, wrongfully converted the note to his own use, or without authority conveyed it to a person other than the one to whom it rightfully belonged.

Trover will lie for the wrongful conversion of bills of exchange, promissory notes, bonds or other securities for the payment of money. Any unauthorized act by which an owner is deprived of his property permanently or indefinitely, or

the exercise of dominion over property inconsistent with the rights of the owner, is a conversion.

The Supreme Court of this State in the case of Knight v. Sanev, 290 Ill. 11, says:

"The authority of a bailee is limited by the terms of the contract by which he acquired the possession of the property. Though he has the bailor's authority to use it for one purpose this confers no right to use it for another, and if he does use it for a different purpose from that for which he was authorized, or in a different manner or for a longer time, he will be held liable for any loss, even through an unavoidable accident. Any unauthorized act which deprives an owner of his property is a conversion. An agent who, having received a bill of exchange to be discounted, procures its discount and appropriates the money to his own use is not guilty of the conversion of the security but a misappropriation of the proceeds, but if instead of getting the bill discounted he uses it for the payment of his own debt he is guilty of a conversion. (Palmer v. Jarman 2 M. & W. 282; Cranch v. White, 1 B.N. C. 414; Adkins v. Owen, 4 Ad. & E. 819.)"

From the facts in the case it appears that both the note and the trust deed were turned over to Boulton by Lewandowski and the note was subsequently conveyed by Boulton to an innocent party for value. Boulton subsequently disappeared and his whereabouts appear to be unknown. It became a question of fact as to whether the defendant held the note for the benefit of the plaintiff and subsequently conveyed it to Boulton without her consent. This was a question of fact which was properly one for the jury to pass upon. The jury found for the plaintiff and the trial court entered judgment in conformity thereto.

This court cannot say that the testimony is so overwhelmingly in favor of the defendant that the judgment of the trial court should be set aside. The only question

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[illegible]

of the trial and it should be well noted. The only exception
overriding in favor of the defendant and the defendant
This court cannot say that the evidence is so

before this court is one of fact. There is no complaint made by defendant as to the giving of instructions or the admissibility or inadmissibility of evidence.

For the reasons stated in this opinion, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

RYNER AND HOLDOM, JJ. CONCUR.

before this court is not at issue. There is no question as to
by defendant as to the right of possession of the property
identity or insolvency of evidence.

For the reasons stated in this opinion, the judgment
of the lower court is affirmed.

REVEREND JUSTICE.

BY THE COURT, J. J. MOHR.

33603

50 UHLEIN REALTY TRUSTEES,

Appellant,

v.

G. C. MARKS,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

256 I.A. 603³

Opinion filed March 5, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

This is an appeal from a judgment of the Municipal Court of Chicago in favor of the defendant, G. C. Marks, and against the plaintiff, Uihlein Realty Trustees, for costs. The suit was based upon a written lease to certain store premises located at 1480 Foster avenue, Chicago, Illinois, at a monthly rental of \$65.00, to be used by the lessee as a dress shop. Lessee entered into possession in August, 1926, and continued in possession until sometime in February of the following year. The lease contained a provision to the effect that heat was to be furnished to a reasonable degree of temperature from October first to June first of each year.

The only question of fact is whether or not plaintiff failed to provide a reasonable amount of heat and that defendant had a right by reason of said failure to move out of the premises on the ground of constructive eviction. The cause was submitted to the court without a jury.

From the facts it appears that the defendant notified plaintiff in November 1926, that the premises were not properly heated. Thereupon the plaintiff undertook to correct this situation, but, as defendant contends, unsuccessfully. There is evidence on behalf of the defendant to the effect that the store had to be closed on one or two occasions in December because the heat was about forty degrees, and that it was impossible

Opinion filed March 5, 1980

There is no record of any judgment of the Criminal Court of Chicago in favor of the defendant, J. J. Barker, and against the plaintiff, William Henry Barker, in 1935. The only case in which the plaintiff was found liable to pay damages to the defendant was a case located at 1935, Barker v. Barker, 111 Ill. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 9

The only evidence of how in debate or not at all?

and has been about forty years, and that it was impossible for me to attend on any of the occasions of treatment because of illness on behalf of the defendant in the attack that the press attention, and, as defendant contends, immorally. There is no doubt that defendant's condition at period of time

to use the premises for the purpose for which they were leased, and that this continued until on or about the middle of February, 1927, when the defendant was compelled to vacate the premises.

Plaintiff testified that the defendant paid the rent for March, but this was denied by the defendant. Some objection is made as to the admissibility of some of the evidence, but because of the fact that the cause was tried by the court, without a jury, it is assumed that the court considered only such evidence as was material and competent. The testimony was conflicting and there is ample evidence to support the position of the defendant that there was a breach of the covenant of the lease in February, which he took advantage of and vacated the premises. The position of the plaintiff that the breach was waived by the payment of the March rent, was a question of fact for the court and, in view of defendant's testimony that it was not paid, and there being no documentary evidence that it was, this court can not say that the trial court erred in arriving at the conclusion it did with regard to that particular fact.

We see no reason for disturbing the judgment of the Municipal Court.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

RYNER AND HOLDEN, JJ. CONCUR.

to use the evidence for the purpose for which they were intended, and that this evidence would be in some way made available to the jury, when the evidence was introduced in evidence for the purpose.

Plaintiff testified that the defendant with the name for Moxon, and this was stated by the defendant. That defendant

is made as to the admissibility of some of the evidence, but because of the fact that the court was told by the court,

affirmed a jury, it is assumed that the court's ruling was only such evidence as was material and competent. The defendant

was conflicting and there is some evidence in evidence as to the admissibility of the defendant's testimony as to the defendant's

conduct of the case in evidence, which is not admissible at and which the court. The court is at the plaintiff

that the court was asked by the court as to the court's ruling, and a question of fact that the court was, in view of the evidence

testimony that it was not said, and there was no contradictory evidence that it was, this court was not say that the jury

must give in evidence of the defendant's testimony as to the jury's testimony to that defendant's testimony.

It was no reason for excluding the defendant's testimony as to the defendant's testimony.

For the purpose of the defendant's testimony, the defendant

of the defendant's testimony is sufficient.

Plaintiff testified.

Plaintiff testified, all evidence.

33646

HELEN C. FIELDS,
Appellant,

v.

WILLIAM G. BOMAN and
MARY BOMAN,
Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

256 I.A. 603⁴

Opinion filed March 5, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion
of the court.

This was an action in tort brought by the plaintiff, Helen C. Fields, to recover damages from the defendants, William G. Boman and Mary Boman, by reason of injuries sustained by the plaintiff in falling down the stairway of a building located at 3508 Rhodes avenue, Chicago. The declaration charges the defendants with carelessly and negligently permitting the stairway of said building to be unlighted and, by reason thereof, plaintiff, who was a tenant in said building, was caused to fall down said stairway and was injured.

The trial resulted in a verdict by the jury of not guilty and judgment on the verdict in favor of the defendants. A number of witnesses testified on both sides. The jury heard their evidence and we are not able to say that their verdict is so manifestly against the weight of the evidence that this court should hold otherwise.

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Opinion filed March 5, 1930

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1940-1941, 1942-1943, 1944-1945, 1946-1947, 1948-1949, 1950-1951, 1952-1953, 1954-1955, 1956-1957, 1958-1959, 1960-1961, 1962-1963, 1964-1965, 1966-1967, 1968-1969, 1970-1971, 1972-1973, 1974-1975, 1976-1977, 1978-1979, 1980-1981, 1982-1983, 1984-1985, 1986-1987, 1988-1989, 1990-1991, 1992-1993, 1994-1995, 1996-1997, 1998-1999, 2000-2001, 2002-2003, 2004-2005, 2006-2007, 2008-2009, 2010-2011, 2012-2013, 2014-2015, 2016-2017, 2018-2019, 2020-2021, 2022-2023, 2024-2025, 2026-2027, 2028-2029, 2030-2031, 2032-2033, 2034-2035, 2036-2037, 2038-2039, 2040-2041, 2042-2043, 2044-2045, 2046-2047, 2048-2049, 2050-2051, 2052-2053, 2054-2055, 2056-2057, 2058-2059, 2060-2061, 2062-2063, 2064-2065, 2066-2067, 2068-2069, 2070-2071, 2072-2073, 2074-2075, 2076-2077, 2078-2079, 2080-2081, 2082-2083, 2084-2085, 2086-2087, 2088-2089, 2090-2091, 2092-2093, 2094-2095, 2096-2097, 2098-2099, 2100-2101, 2102-2103, 2104-2105, 2106-2107, 2108-2109, 2110-2111, 2112-2113, 2114-2115, 2116-2117, 2118-2119, 2120-2121, 2122-2123, 2124-2125, 2126-2127, 2128-2129, 2130-2131, 2132-2133, 2134-2135, 2136-2137, 2138-2139, 2140-2141, 2142-2143, 2144-2145, 2146-2147, 2148-2149, 2150-2151, 2152-2153, 2154-2155, 2156-2157, 2158-2159, 2160-2161, 2162-2163, 2164-2165, 2166-2167, 2168-2169, 2170-2171, 2172-2173, 2174-2175, 2176-2177, 2178-2179, 2180-2181, 2182-2183, 2184-2185, 2186-2187, 2188-2189, 2190-2191, 2192-2193, 2194-2195, 2196-2197, 2198-2199, 2200-2201, 2202-2203, 2204-2205, 2206-2207, 2208-2209, 2210-2211, 2212-2213, 2214-2215, 2216-2217, 2218-2219, 2220-2221, 2222-2223, 2224-2225, 2226-2227, 2228-2229, 2230-2231, 2232-2233, 2234-2235, 2236-2237, 2238-2239, 2240-2241, 2242-2243, 2244-2245, 2246-2247, 2248-2249, 2250-2251, 2252-2253, 2254-2255, 2256-2257, 2258-2259, 2260-2261, 2262-2263, 2264-2265, 2266-2267, 2268-2269, 2270-2271, 2272-2273, 2274-2275, 2276-2277, 2278-2279, 2280-2281, 2282-2283, 2284-2285, 2286-2287, 2288-2289, 2290-2291, 2292-2293, 2294-2295, 2296-2297, 2298-2299, 2300-2301, 2302-2303, 2304-2305, 2306-2307, 2308-2309, 2310-2311, 2312-2313, 2314-2315, 2316-2317, 2318-2319, 2320-2321, 2322-2323, 2324-2325, 2326-2327, 2328-2329, 2330-2331, 2332-2333, 2334-2335, 2336-2337, 2338-2339, 2340-2341, 2342-2343, 2344-2345, 2346-2347, 2348-2349, 2350-2351, 2352-2353, 2354-2355, 2356-2357, 2358-2359, 2360-2361, 2362-2363, 2364-2365, 2366-2367, 2368-2369, 2370-2371, 2372-2373, 2374-2375, 2376-2377, 2378-2379, 2380-2381, 2382-2383, 2384-2385, 2386-2387, 2388-2389, 2390-2391, 2392-2393, 2394-2395, 2396-2397, 2398-2399, 2400-2401, 2402-2403, 2404-2405, 2406-2407, 2408-2409, 2410-2411, 2412-2413, 2414-2415, 2416-2417, 2418-2419, 2420-2421, 2422-2423, 2424-2425, 2426-2427, 2428-2429, 2430-2431, 2432-2433, 2434-2435, 2436-2437, 2438-2439, 2440-2441, 2442-2443, 2444-2445, 2446-2447, 2448-2449, 2450-2451, 2452-2453, 2454-2455, 2456-2457, 2458-2459, 2460-2461, 2462-2463, 2464-2465, 2466-2467, 2468-2469, 2470-2471, 2472-2473, 2474-2475, 2476-2477, 2478-2479, 2480-2481, 2482-2483, 2484-2485, 2486-2487, 2488-2489, 2490-2491, 2492-2493, 2494-2495, 2496-2497, 2498-2499, 2500-2501, 2502-2503, 2504-2505, 2506-2507, 2508-2509, 2510-2511, 2512-2513, 2514-2515, 2516-2517, 2518-2519, 2520-2521, 2522-2523, 2524-2525, 2526-2527, 2528-2529, 2530-2531, 2532-2533, 2534-2535, 2536-2537, 2538-2539, 2540-2541, 2542-2543, 2544-2545, 2546-2547, 2548-2549, 2550-2551, 2552-2553, 2554-2555, 2556-2557, 2558-2559, 2560-2561, 2562-2563, 2564-2565, 2566-2567, 2568-2569, 2570-2571, 2572-2573, 2574-2575, 2576-2577, 2578-2579, 2580-2581, 2582-2583, 2584-2585, 2586-2587, 2588-2589, 2590-2591, 2592-2593, 2594-2595, 2596-2597, 2598-2599, 2600-2601, 2602-2603, 2604-2605, 2606-2607, 2608-2609, 2610-2611, 2612-2613, 2614-2615, 2616-2617, 2618-2619, 2620-2621, 2622-2623, 2624-2625, 2626-2627, 2628-2629, 2630-2631, 2632-2633, 2634-2635, 2636-2637, 2638-2639, 2640-2641, 2642-2643, 2644-2645, 2646-2647, 2648-2649, 2650-2651, 2652-2653, 2654-2655, 2656-2657, 2658-2659, 2660-2661, 2662-2663, 2664-2665, 2666-2667, 2668-2669, 2670-2671, 2672-2673, 2674-2675, 2676-2677, 2678-2679, 2680-2681, 2682-2683, 26

we have $\mathcal{L}(\mathcal{A}) \subseteq \mathcal{L}(\mathcal{B})$ and $\mathcal{L}(\mathcal{B}) \subseteq \mathcal{L}(\mathcal{A})$ and hence $\mathcal{L}(\mathcal{A}) = \mathcal{L}(\mathcal{B})$.

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and the other two are in the same position as the first two.

The number and frequency of the following words were

[illegible]

Objection is made to the conduct of the counsel for the defendants in interrogating witnesses. Objections were made and sustained and counsel reprimanded by the court. An examination of these questions and the answers which were stricken out, do not appear to have been of such a character as to be prejudicial. As a matter of fact it appears that some of them might have been competent.

Objection is made by counsel for plaintiff in their brief to the giving of instruction number eight. This instruction is not set out in the brief in full or in part and this court is not required to search for it elsewhere. We find no such error in the record as would warrant a reversal.

For the reasons stated in this opinion, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

RYNER AND HOLDOM, JJ. CONCUR.

Objection is made to the content of the report for the defendant in the following instances, objection was made and sustained and counsel submitted by the court. In examination of these questions and the answers which were given to me, no answer is given to any of them a character as to be prejudicial. As a matter of fact it appears that some of them have been answered.

Objection is made by counsel for plaintiff in their brief to the giving of instruction number eight. This instruction is not set out in the brief in full or in part and this court is not required to search for it elsewhere. We find no such error in the record as would warrant a reversal.

For the reasons stated in this opinion, the judgment of the Superior Court is affirmed.

FOR THE DEFENDANT,

WILLIAM H. HOGAN, JR., COUNSEL.

33671

GARDINER METAL CO., a corporation,

Defendant in Error,

v.

FRANK DI CRISTOFORO,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

256 I.A. 604

Opinion filed March 5, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

The defendant in error, Gardiner Metal Co., a corporation, plaintiff below, filed its statement of claim against Frank Di Cristoforo, plaintiff in error here and defendant below, charging that the defendant, Frank Di Cristoforo, was indebted to the plaintiff for goods and merchandise sold to him, for which he had refused to pay. Charges further that after allowing all due credits, there was due the plaintiff the sum of \$847.86. Attached to said statement of claim was an affidavit as to the amount due. Personal service and summons was had on the defendant who, thereupon, filed his appearance and demanded a jury trial. Time to file an affidavit of defense was extended and on October 26, 1927, an affidavit of merits to the action was filed by the defendant, by his attorney. This affidavit of merits was stricken from the files and defendant ordered to file his amended affidavit within ten days from November 9, 1927. An amended affidavit of merits was filed by the defendant on November 21, 1927, and what appears to be a second amended affidavit of merits, subscribed and sworn to, was filed December 8, 1927. On motion of plaintiff, entered May 3, 1929, the last amended statement of claim was stricken from the files, and judgment by default entered against the defendant for \$847.86.

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The following is a list of the cases in which the plaintiff has been successful in obtaining judgment against the defendant, and the amount of the judgment in each case:

1. *Plaintiff v. Defendant*, 1917, \$100.00.

2. *Plaintiff v. Defendant*, 1918, \$200.00.

3. *Plaintiff v. Defendant*, 1919, \$300.00.

4. *Plaintiff v. Defendant*, 1920, \$400.00.

5. *Plaintiff v. Defendant*, 1921, \$500.00.

6. *Plaintiff v. Defendant*, 1922, \$600.00.

7. *Plaintiff v. Defendant*, 1923, \$700.00.

8. *Plaintiff v. Defendant*, 1924, \$800.00.

9. *Plaintiff v. Defendant*, 1925, \$900.00.

10. *Plaintiff v. Defendant*, 1926, \$1,000.00.

11. *Plaintiff v. Defendant*, 1927, \$1,100.00.

12. *Plaintiff v. Defendant*, 1928, \$1,200.00.

13. *Plaintiff v. Defendant*, 1929, \$1,300.00.

14. *Plaintiff v. Defendant*, 1930, \$1,400.00.

15. *Plaintiff v. Defendant*, 1931, \$1,500.00.

16. *Plaintiff v. Defendant*, 1932, \$1,600.00.

17. *Plaintiff v. Defendant*, 1933, \$1,700.00.

18. *Plaintiff v. Defendant*, 1934, \$1,800.00.

19. *Plaintiff v. Defendant*, 1935, \$1,900.00.

20. *Plaintiff v. Defendant*, 1936, \$2,000.00.

21. *Plaintiff v. Defendant*, 1937, \$2,100.00.

22. *Plaintiff v. Defendant*, 1938, \$2,200.00.

23. *Plaintiff v. Defendant*, 1939, \$2,300.00.

24. *Plaintiff v. Defendant*, 1940, \$2,400.00.

25. *Plaintiff v. Defendant*, 1941, \$2,500.00.

26. *Plaintiff v. Defendant*, 1942, \$2,600.00.

27. *Plaintiff v. Defendant*, 1943, \$2,700.00.

28. *Plaintiff v. Defendant*, 1944, \$2,800.00.

29. *Plaintiff v. Defendant*, 1945, \$2,900.00.

30. *Plaintiff v. Defendant*, 1946, \$3,000.00.

31. *Plaintiff v. Defendant*, 1947, \$3,100.00.

32. *Plaintiff v. Defendant*, 1948, \$3,200.00.

33. *Plaintiff v. Defendant*, 1949, \$3,300.00.

34. *Plaintiff v. Defendant*, 1950, \$3,400.00.

35. *Plaintiff v. Defendant*, 1951, \$3,500.00.

36. *Plaintiff v. Defendant*, 1952, \$3,600.00.

37. *Plaintiff v. Defendant*, 1953, \$3,700.00.

38. *Plaintiff v. Defendant*, 1954, \$3,800.00.

39. *Plaintiff v. Defendant*, 1955, \$3,900.00.

40. *Plaintiff v. Defendant*, 1956, \$4,000.00.

41. *Plaintiff v. Defendant*, 1957, \$4,100.00.

42. *Plaintiff v. Defendant*, 1958, \$4,200.00.

43. *Plaintiff v. Defendant*, 1959, \$4,300.00.

44. *Plaintiff v. Defendant*, 1960, \$4,400.00.

45. *Plaintiff v. Defendant*, 1961, \$4,500.00.

46. *Plaintiff v. Defendant*, 1962, \$4,600.00.

47. *Plaintiff v. Defendant*, 1963, \$4,700.00.

48. *Plaintiff v. Defendant*, 1964, \$4,800.00.

49. *Plaintiff v. Defendant*, 1965, \$4,900.00.

50. *Plaintiff v. Defendant*, 1966, \$5,000.00.

51. *Plaintiff v. Defendant*, 1967, \$5,100.00.

52. *Plaintiff v. Defendant*, 1968, \$5,200.00.

53. *Plaintiff v. Defendant*, 1969, \$5,300.00.

54. *Plaintiff v. Defendant*, 1970, \$5,400.00.

55. *Plaintiff v. Defendant*, 1971, \$5,500.00.

56. *Plaintiff v. Defendant*, 1972, \$5,600.00.

57. *Plaintiff v. Defendant*, 1973, \$5,700.00.

58. *Plaintiff v. Defendant*, 1974, \$5,800.00.

59. *Plaintiff v. Defendant*, 1975, \$5,900.00.

60. *Plaintiff v. Defendant*, 1976, \$6,000.00.

61. *Plaintiff v. Defendant*, 1977, \$6,100.00.

62. *Plaintiff v. Defendant*, 1978, \$6,200.00.

63. *Plaintiff v. Defendant*, 1979, \$6,300.00.

64. *Plaintiff v. Defendant*, 1980, \$6,400.00.

65. *Plaintiff v. Defendant*, 1981, \$6,500.00.

66. *Plaintiff v. Defendant*, 1982, \$6,600.00.

67. *Plaintiff v. Defendant*, 1983, \$6,700.00.

68. *Plaintiff v. Defendant*, 1984, \$6,800.00.

69. *Plaintiff v. Defendant*, 1985, \$6,900.00.

70. *Plaintiff v. Defendant*, 1986, \$7,000.00.

71. *Plaintiff v. Defendant*, 1987, \$7,100.00.

72. *Plaintiff v. Defendant*, 1988, \$7,200.00.

73. *Plaintiff v. Defendant*, 1989, \$7,300.00.

74. *Plaintiff v. Defendant*, 1990, \$7,400.00.

75. *Plaintiff v. Defendant*, 1991, \$7,500.00.

76. *Plaintiff v. Defendant*, 1992, \$7,600.00.

77. *Plaintiff v. Defendant*, 1993, \$7,700.00.

78. *Plaintiff v. Defendant*, 1994, \$7,800.00.

79. *Plaintiff v. Defendant*, 1995, \$7,900.00.

80. *Plaintiff v. Defendant*, 1996, \$8,000.00.

81. *Plaintiff v. Defendant*, 1997, \$8,100.00.

82. *Plaintiff v. Defendant*, 1998, \$8,200.00.

83. *Plaintiff v. Defendant*, 1999, \$8,300.00.

84. *Plaintiff v. Defendant*, 2000, \$8,400.00.

85. *Plaintiff v. Defendant*, 2001, \$8,500.00.

86. *Plaintiff v. Defendant*, 2002, \$8,600.00.

87. *Plaintiff v. Defendant*, 2003, \$8,700.00.

88. *Plaintiff v. Defendant*, 2004, \$8,800.00.

89. *Plaintiff v. Defendant*, 2005, \$8,900.00.

90. *Plaintiff v. Defendant*, 2006, \$9,000.00.

91. *Plaintiff v. Defendant*, 2007, \$9,100.00.

92. *Plaintiff v. Defendant*, 2008, \$9,200.00.

93. *Plaintiff v. Defendant*, 2009, \$9,300.00.

94. *Plaintiff v. Defendant*, 2010, \$9,400.00.

95. *Plaintiff v. Defendant*, 2011, \$9,500.00.

96. *Plaintiff v. Defendant*, 2012, \$9,600.00.

97. *Plaintiff v. Defendant*, 2013, \$9,700.00.

98. *Plaintiff v. Defendant*, 2014, \$9,800.00.

99. *Plaintiff v. Defendant*, 2015, \$9,900.00.

100. *Plaintiff v. Defendant*, 2016, \$10,000.00.

101. *Plaintiff v. Defendant*, 2017, \$10,100.00.

102. *Plaintiff v. Defendant*, 2018, \$10,200.00.

103. *Plaintiff v. Defendant*, 2019, \$10,300.00.

104. *Plaintiff v. Defendant*, 2020, \$10,400.00.

105. *Plaintiff v. Defendant*, 2021, \$10,500.00.

106. *Plaintiff v. Defendant*, 2022, \$10,600.00.

107. *Plaintiff v. Defendant*, 2023, \$10,700.00.

108. *Plaintiff v. Defendant*, 2024, \$10,800.00.

109. *Plaintiff v. Defendant*, 2025, \$10,900.00.

110. *Plaintiff v. Defendant*, 2026, \$11,000.00.

111. *Plaintiff v. Defendant*, 2027, \$11,100.00.

112. *Plaintiff v. Defendant*, 2028, \$11,200.00.

113. *Plaintiff v. Defendant*, 2029, \$11,300.00.

114. *Plaintiff v. Defendant*, 2030, \$11,400.00.

115. *Plaintiff v. Defendant*, 2031, \$11,500.00.

116. *Plaintiff v. Defendant*, 2032, \$11,600

This writ of error was sued out of the Appellate Court to review the action of the trial court in entering this judgment.

It is urged for reversal that the last affidavit of merits filed by the defendant, was filed without leave of court and was a nullity, but there is nothing in the record, as shown by the abstract, which shows whether it was the affidavit of merits filed without notice that was stricken, or the one that was filed November 21st. The action of the trial court in striking the affidavit, must be presumed to have been properly taken. The order striking the affidavit of defense and entering of judgment by default, was over a year after the filing of the suit, and the action may have been taken by the court after due notice or after said cause was reached in its regular order upon the trial call. What took place is not preserved by a bill of exceptions and, in its absence, we must presume that the action of the court was regular and orderly, and that its action was properly taken. Motions and orders striking pleas and affidavits from the files, and exceptions thereto, should be preserved by the bill of exceptions and cannot be made part of the record otherwise. So far as this record discloses, no exception was taken to the action of the trial court. Mann v. Brown, 363 Ill. 394.

It is also insisted that the court committed error in entering judgment by default, when there was a demand for a jury entered in the cause by the defendant. In the case at bar the demand for a jury was made before the default was entered and no further demand was made after the default for the purpose of assessing damages. The Supreme Court of this state in the case of Mann v. Brown, supra, in its opinion says:

This bill of 1890 was passed out of the Legislature

without a review of the entire bill in committee.
This judgment.

It is urged for removal that the bill is

of service filed by the defendant, and filed without leave of
court and was a nullity, but there is nothing in the record,

as shown by the exhibits, which shows that it was the
affidavit of service filed without notice that was returned,
or the one that was filed November 1890. The action of the
trial court in striking the affidavit, must be presumed to
have been properly taken. The court striking the affidavit
of defense and refusing to judge by default, was over a
year after the filing of the bill, and the action was not
been taken by the court until the motion or other bill was
was reached in the regular order of the trial bill, that
bill does it not constitute a bill of exceptions and, in
the absence of any motion to set aside the action of the court and
renewal and orderly, and that the action was properly taken.

Actions and causes arising from and attached from the
bill, and exceptions thereto, should be preserved by the bill
of exceptions and cannot be made part of the record otherwise.
So far as this record is concerned, no exception was taken in
the action of the trial court. Wright v. Brown, 100 Ill. 324.

It is also claimed that the court committed error
in entering judgment by default, that there was a default for
a jury waived in the absence of the defendant. In the case
of Wright v. Brown 100 Ill. 324, it was held that a jury was waived before the default was
entered and no further action was made after the default for
the purpose of assessing damages. The default of jury of this
case in the case of Wright v. Brown, 100 Ill. 324, in the opinion of the

"The judgment by default after appearance entered was irregular. It should have been a judgment nil dicit or for want of plea, but this irregularity is not necessarily reversible. (Plaff v. Pacific Express Co., 251 Ill. 243.) No objection was made to the judgment by default and no request was made by plaintiffs in error for a jury to assess the damages after default entered. . . . The demand for a jury was made before there was any default and when it was apparent plaintiffs in error did not contemplate a judgment against them by default. The demand was for 'trial by jury', and we think it clear had reference to a trial of the issues when made up and not to an assessment of damages. If plaintiffs in error had wanted the damages assessed by a jury they should have made that request after default was entered, and not have stood by and without objection allowed the court to assess the damages. The court was warranted in assuming the demand for trial by jury made on entering their appearance did not mean they wanted the damages assessed by a jury after default."

We see no reason for disturbing the judgment of the trial court.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

RYNER AND HOLDOM, JJ. CONCUR.

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• *Blackburn, 1997, p. 37*

THE UNIVERSITY OF CHICAGO

33737

GERTRUDE M. RICHARDSON,
Appellee,

v.

EARNEY S. HENDRICKS, Doing
Business as F. S. Hendricks & Co.,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

256 I.A. 604²

Opinion filed March 5, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion
of the court.

This is an appeal from a judgment for \$2,855.25,
in favor of the plaintiff Gertrude M. Richardson and against
the defendant Earney S. Hendricks, doing business as F. S.
Hendricks & Co.

The brief of plaintiff fails to comply with the
rules of this court in that it does not contain a short,
concise statement of the facts, but instead sets out the
testimony of the witnesses in extenso; neither does it contain
a terse outline of the principal points relied upon for
reversal, as required by Rule 19 of this Court.

Under the heading, "Brief" two points are made:
First, that a deed without proof of possession or title in
grantor does not prove title; Second, that it is incompetent
to prove title to land by parol evidence.

The action was brought to recover rentals claimed
to be collected by the defendant as the agent of the plaintiff
and for which the defendant had failed to account.

While the question is not raised in the brief,
except in the argument, nevertheless, we are of the opinion

Opinion filed March 5, 1930

of the court.

This is an appeal from a judgment for \$1,000.00, in favor of the plaintiff, against the defendant, the defendant having failed to pay the same.

The writ of habeas corpus is not a remedy with the rules of this court in that it does not contain a finding of fact, but instead sets out the testimony of the witnesses in evidence, and it is not a review of the evidence, but a review of the evidence as presented by the parties.

Under the present law, which has been in effect since 1907, a writ of habeas corpus is not a remedy with the rules of this court in that it does not contain a finding of fact, but instead sets out the testimony of the witnesses in evidence, and it is not a review of the evidence, but a review of the evidence as presented by the parties.

The writ of habeas corpus is not a remedy with the rules of this court in that it does not contain a finding of fact, but instead sets out the testimony of the witnesses in evidence, and it is not a review of the evidence, but a review of the evidence as presented by the parties.

that there was sufficient evidence to sustain the verdict of the jury and the judgment of the court was entered pursuant thereto. The same degree of proof is not required to prove title to real estate where that question is a collateral one in the case. The question of title was not involved in this proceeding, other than a sufficient showing to entitle the plaintiff to maintain her action. If, in fact, and the court so found the fact to be, the defendant was the agent of the plaintiff, then it did not lie in his mouth to dispute his principal's title.

Where the title to real estate is only collaterally involved, that fact may be established by parol evidence. In the case at bar, the plaintiff not only testified that she was the owner of the premises in question, but produced an original deed from her grantor. This evidence, standing alone, was sufficient. No evidence was produced on the part of the defendant contradicting this fact. 22 Corpus Juris, section 1249.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

RYNER AND HOLDOM, JJ. CONCUR.

That there was sufficient evidence to sustain the verdict of the jury and the judgment of the court was stated somewhat differently. The same degree of proof is not required to prove guilt as to prove insanity. That question is a well known one in the law. The evidence of guilt was not involved in this proceeding, other than a sufficient showing to sustain the verdict of the jury. It is true, and the court so found the fact to be, the defendant was the agent of the plaintiff, then it did not lie in his mouth to dispute his guilt.

1945.

of the United States is all right.

CONSTITUTIONAL HISTORY.

1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 26

33789

5 GEORGE E. WEST, EDWIN M. WEST,
and GEORGE M. HUBBARD, Co-
partners, trading as Geo. E.
West & Son,

Appellees,

v.

GOLFMORE LAND COMPANY,
a corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COCK COUNTY.

256 I.A. 604³

Opinion filed March 5, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion
of the court.

The plaintiffs, George E. West, Edwin M. West and
George M. Hubbard, co-partners, trading as Geo. E. West & Son,
brought this action against Golfmore Land Company, a corporation,
defendant, to recover for services rendered as auditors and
accountants in defeating a claim of the United States Government
against the defendant for an excise tax of ten percent on the
moneys paid the defendant for the use of its golf course.

The claim was based upon the theory of the government
that such moneys were taxable as dues or membership fees. The
position taken by the defendant was that it was the owner of
the premises which were used in the year 1923 by the Playmore
Golf Club and later by the Wilmette Golf Club, and that the
fees or dues were paid to the defendant as rent, - the defendant
being a landlord. The conception of this defense is claimed
both by Cunningham for the defendant and West for plaintiffs.
The total aggregate of alleged rentals so received for the
years in question amounted to \$201,379, upon which basis,
according to the plaintiffs' claim, the tax together with
penalties and interest would aggregate \$30,124.04. It is the
position of plaintiff that the fair and reasonable compensation

1930

JOHN A. HENRY, JR.,
and JOHN A. HENRY, JR.,
Plaintiffs,
vs.
JOHN A. HENRY, JR.,
Defendant.

Case No. 100-10000

JOHN A. HENRY, JR.,
a corporation,
Defendant.

Plaintiff.

100-10000

Opinion filed March 5, 1930

MR. JUSTICE BRIDGES delivered the opinion

of the court.

The complaint alleges that John A. Henry, Jr., and

George A. Henry, co-defendants, trading as John A. Henry & Son,

procure this action against John A. Henry, Jr., a corporation,

defendant, to recover for services rendered to said John A.

Henry, Jr., in obtaining a claim of the United States Government

against the defendant for an excise tax of ten percent on the

profits of the defendant for the year of 1929.

The claim was based upon the theory of the Government

that such profits were taxable as such or partnership form. The

position taken by the defendant was that it was the property of

the plaintiff which was sold in the year 1929 by the plaintiff

Gold Club and later by the plaintiff Gold Club, and that the

fact as such was not the defendant's fault, - the defendant

being a plaintiff. The contention of this nature is raised

both by complaint and the defendant and may be resolved

by a total rejection of alleged profits as received for the

year in question amounting to \$101,717.25, or which latter

amounting to the plaintiff's claim, the tax together with

penalties and interest would amount to \$101,717.25. It is the

position of plaintiff that the fact and reasonable contemplation

for services would be approximately twenty-five per cent of \$30,124.04.

The jury was waived and the cause submitted to the court, resulting in a finding in favor of the plaintiffs for the amount of \$4,500.00, upon which judgment was entered and an appeal prayed and allowed to this court.

The declaration consisted of three counts. The first count, a special count in assumpsit, charged an express agreement between the parties under which the defendant was to pay plaintiffs nothing in the event they were unable to secure a cancellation or reduction of the taxes, but that in the event plaintiffs were successful, then they were to receive a reasonable fee. The second count is on a quantum meruit for services rendered. The third count is the common counts, together with a copy of the account sued upon.

Defendant interposed a plea of the general issue and an affidavit of merits to the effect that it had a good defense to the entire claim in excess of \$500.00, and that a reasonable fee would not exceed that amount. From the pleadings it appears that the cause was tried upon the question as to what would be a reasonable fee. The trial court found as a proposition of law:

"A. The court holds defendant is liable to plaintiffs for a reasonable amount as compensation for their services, regardless of any usage or custom as to compensation, and the finding and conclusion of the Court as to what constitutes reasonable compensation in this case is not based on evidence of usage or custom offered in this case."

We cite this proposition of law as held by the trial court at this time, because of the fact that the principal reliance of the defendant for a reversal of the judgment appears

for services rendered by defendant, together with the cost of
\$10,000.00.

The jury was asked and the same returned to the
court, resulting in a finding in favor of the plaintiff for
the amount of \$10,000.00, with costs, which amount was entered on
an order, which was allowed to this court.

The decision consisted of three counts. The
first count, a special count in favor of the plaintiff, charged an express
contract between the parties under which the defendant was
to pay plaintiff's salary in the event they were unable to
secure a cancellation or reduction of the taxes, but that in
the event plaintiff was successful, then they were to receive
a reasonable fee. The second count is in a similar manner for
services rendered. The third count is the common count,
together with a copy of the record and again.

Defendant answered a plea of the general issue and
an affidavit of denial to the effect that it was a good defense
to the entire claim in amount of \$1000.00, and that a reasonable
fee would not exceed that amount. From the findings it appears
that the issue was tried upon the question as to what would
be a reasonable fee. The first count found in a verdict for
of law:

"We, the jury, being satisfied it is due to
plaintiff for a reasonable amount as compensation
for his services, rendered to the plaintiff
under an express contract, and the finding and
conclusion of the court as to what constitutes
reasonable compensation in this case is not correct
on evidence at hand or upon other facts in this case."

So this decision of law is held by the court.

At this time, because of the fact that the plaintiff
relies on the findings of the jury on the following issues:

to be based mainly upon the fact that there was evidence introduced as to the custom of accountants in regard to their charges. It is insisted that a custom in order to be binding, ~~must~~ be known to both parties, or presumed to be known, or that the defendant should have actual notice of the custom; that when a custom is relied upon as a basis for reversal, it must be pleaded; that an opinion based upon a usual, customary and reasonable charge, must be for services rendered on a per diem basis; that no such evidence was adduced on behalf of the plaintiffs showing a reasonable and customary charge based on a per diem basis.

A number of witnesses were produced who testified on behalf of the plaintiffs, some of whom were asked the question as to what was the usual, customary and minimum charge. On the other hand, other witnesses were asked the question as to what would be, in their opinion, a fair and reasonable compensation for the services of the plaintiffs. Herbert Condit, a witness on behalf of the plaintiffs, testified that \$7,500.00 in his opinion would be a fair and reasonable compensation for the services rendered. Russell E. Comfort, a witness on behalf of the plaintiffs, testified that \$7,531.00 would be a fair and reasonable compensation for the services performed by the plaintiffs. Both of these witnesses were qualified as experts and both testified that their opinions were based upon all the testimony given in open court on behalf of the plaintiffs. This testimony referred to by the witnesses was that concerning the services rendered and the situation as it existed. A jury having been waived, it is presumed that the trial court considered only such testimony as was material and competent. Moreover, the court expressly found in the proposition of law submitted

to be based mainly upon the fact that there was no evidence in-
ferred as to the nature of accountants in regard to their charges.
It is insisted that a custom in order to be binding, must be
known as both written, or presumed to be known, or that the
basis of it should have actual notice of the custom; that such a
custom is relied upon as a basis for recovery, it must be
proved; that an opinion cannot be a custom, customary and
reasonable usage, must be for services rendered on a particular
basis; that no such evidence was shown on behalf of the
plaintiffs showing a reasonable and customary charge based on
a well known basis.

A number of witnesses were returned by the parties
 on behalf of the Plaintiff, some of whom were called by the Plaintiff
 as to what was the usual practice of the Plaintiff in the
 first hand, other witnesses were called by the Plaintiff as to what
 would be, in their opinion, a fair and reasonable compensation
 for the services of the Plaintiff. Various amounts were offered
 on behalf of the Plaintiff, testified that \$7,500.00 in the
 opinion would be a fair and reasonable compensation for the
 services rendered. Several other amounts were offered on behalf of
 the Plaintiff, testified that \$7,500.00 would be a fair and
 reasonable compensation for the services rendered by the Plaintiff.
 None of these witnesses was qualified as experts and
 each testified that their opinions were based upon all the
 testimony given in this case on behalf of the Plaintiff.
 This testimony referred to by the witnesses was that compensation
 the services rendered was the question as to what, a fair
 value was given, it is known that the Plaintiff would not have
 only with testimony as was stated and accepted. However,
 the court is hereby found in the proposition of the Plaintiff

to him, that his consideration has been based only upon evidence pertinent to the question of a reasonable fee.

There was a conflict in the evidence as to whether or not the services were to be performed upon a contingent fee. This question in our opinion is settled by the finding and judgment of the trial court which heard the witnesses and observed their demeanor while upon the witness stand. The pleadings charged that no amount had been agreed upon as compensation, but the amount was to be decided upon the successful result of the efforts of the plaintiffs. The value of the services depended upon a number of considerations, such as the skill and standing of the person employed, the nature of the controversy, the character of the question at issue, the amount and importance of the subject-matter of the suit, the time and labor bestowed and the results accomplished. Under such circumstances, evidence of those familiar with such services is competent. There could be no fixed rule, determinative of the value of such services and the judgment of the trial court must, necessarily, depend upon the opinion of those qualified to express an opinion as to their value.

L. N.A. & C. Ry. Co. v. Wallace, 136 Ill. 87.

Objection was made to the ruling of the trial court, in refusing to admit evidence to the effect that the rules of the Department of Internal Revenue require attorneys or agents handling cases to file an affidavit showing whether such agents or attorneys are working upon a contingent basis. We see no error in the ruling of the trial court on this question, nor to its ruling on the question propounded to the witness West as to whether he had filed such an affidavit; nor

to him, that his examination has been only made without
reference to the question of a reasonable doubt.

There was a conflict in the evidence as to whether

or not the service was in the nature of a quasi-judicial
one. This question in my opinion is settled by the language
and tenor of the trial court which heard the evidence and
observed that the service was in the nature of a quasi-judicial

service, that it was not a service in the nature of a quasi-judicial

service, but the service was in the nature of a quasi-judicial

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It is the duty of the court to decide the case on the merits.

Referring to the case of the trial court.

It is the duty of the court to decide the case on the merits.

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It is the duty of the court to decide the case on the merits.

do we believe that it was error in holding that it was not competent to prove by the witness Cunningham that he had no knowledge of any custom of accountants handling excise tax cases to charge a certain percentage of the amount of the tax recovered or abated.

Under the charge in the pleadings and the theory upon which the case was tried, there was an express agreement between the parties to the effect that the fee was to be contingent upon the result, regardless of custom. We see no reason for disturbing the judgment of the trial court.

For the reasons stated in this opinion, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

RYNER AND HOLDOM, JJ. CONCUR.

to be believe that it was error in finding that it was not
competent to give by the witness testimony that he had no
knowledge of any action of a committee holding inquiry for
cases in charge a certain category of the cases in the
tax recovered in 1914.

Under the charge in the indictment and the theory
upon which the case was tried, there was no rational statement
between the parties to the effect that the law was to be
confronted upon the results, the charges of evidence. He was no
reason for discharging the judgment of the trial court.
For the reasons stated in this opinion, the judgment
of the district court is affirmed.

REVEREND JUSTICE

WILLIAM H. HARRIS, JR., JUDGE

33564

A. M. ROSENBLUM,

Appellee,

v.

ERNEST A. CARLSON,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

256 I.A. 604⁴

Opinion filed March 5, 1930

MR. JUSTICE HOLDOM delivered the opinion of the court.

A judgment by confession was entered in the Circuit Court of Cook County upon warrants of attorney endorsed on two promissory notes made by Edward D. Rosen and Agnes E. Rosen, one for \$1600 and the other for \$1700, with interest, which notes were guaranteed by defendant with powers of attorney to confess judgments thereon with reasonable attorney's fees to be taxed and costs. Judgment was entered against defendant on the two notes on March 9, 1928, for \$3,524 and costs. On January 26, 1929, defendant moved to vacate the judgment and to be allowed to plead to the merits of the action. The common law record shows that an affidavit was filed in support of said motion. This motion was denied and from the order denying that motion defendant prayed and was allowed an appeal to this court from the judgment by confession, and the record is before us for review.

The order denying defendant's motion to vacate the judgment entered by confession and the order allowing an appeal to this court are in the following words:

Opinion filed March 2, 1930

and to further act together in 1930. (b) (7)(C), (b) (7)(D)

27740

and the record is before me for review.

the order having been received from the Bureau to make the
 necessary arrangements for the transfer of the case to the
 Bureau of Investigation and the order directed to the
 Bureau of Investigation to make the necessary arrangements
 for the transfer of the case to the Bureau of Investigation.

"This cause coming on to be heard upon the defendant's motion to vacate the judgment heretofore rendered herein by confession, after arguments of counsel and due deliberation by the court said motion is denied to which the defendant excepts.

Thereupon the defendant having entered his exceptions herein prays an appeal from the above judgment of this court to the Appellate Court in and for the First District of the State of Illinois which is allowed upon filing herein his appeal bond in the penal sum of One Hundred and Fifty Dollars (\$150.00) to be approved by the court within thirty days from this date and sixty days time from this date is hereby allowed said defendant in which to file his bill of exceptions herein."

It will be observed that the appeal is from the judgment and not from the order denying defendant's motion to vacate it.

The common law record only is before us. That discloses no error of procedure. The judgment is entered in accord with the warrants of attorney to confess it.

There is no bill of exceptions found in the record preserving the proceedings had on the motion to vacate the judgment. Lacking a bill of exceptions naught is presented to this court for review. The evidence, if any, heard upon the motion to vacate must be preserved for review in a bill of exceptions.

As held in Boyles v. Chytraus, 175 Ill. 370, the warrant of attorney, affidavit of execution and the note upon which judgment by confession is rendered in term time, must be preserved by a bill of exceptions to authorize the consideration on appeal of alleged errors which require an inspection by the reviewing tribunals. In the absence of such a bill of exceptions it will be presumed the court heard evidence on the questions as to whether the note was properly endorsed and whether the

warrant of attorney was so drawn as to bind the defendant.

As said in Peter Hand Brewing Co. v. Nauseda, et al.,
210 Ill. App. 153:

"The abstract, which is the pleading of the defendant, contains the affidavits read upon the hearing of the motion to open the judgment. These have no place in the statutory record, but belong in the bill of exceptions. As the latter document has been stricken we are not privileged to examine or review these affidavits and consequently are not at liberty to decide their probative force, but must assume that the ruling of the trial judge on the motion was correct and not in the condition of the record subject to challenge. Horn v. Neu, 63 Ill. 539; Alward v. Harper, 253 Ill. 294; People v. Board of Review of Cook County, 263 Ill. 326."

This appeal is from the judgment by confession and not from the order denying the motion to vacate such judgment. In Pennsylvania Co. v. Green, 79 Ibid. 127, it was held that where no appeal is taken from an order overruling a motion to vacate a judgment, the Appellate Court, on appeal from the judgment below, cannot review such order. That is the situation in the case at bar. There are many cases to a like effect appearing in many decisions of this court, which might be recited.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

WILSON, P.J. AND RYNER, J. CONCUR.

33573

MADISON & KEDZIE STATE BANK,

Appellant,

E.E. MOHR,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

256 I.A. 604⁵

Opinion filed March 5, 1930

MR. JUSTICE HOLDOM delivered the opinion of the court.

On July 12, 1928, a judgment was confessed on a cognovit in favor of the plaintiff, the assignee of a note made by defendant to the order of Austin Hospital Association for the sum of \$1300, and by the payee endorsed and delivered to the plaintiff bank before maturity. The amount of the judgment was \$1464.75, which included \$90 attorney's fees. On motion of defendant, supported by affidavit, he was let in to plead upon the merits, the judgment in the meantime to stand as security.

There was a trial before the court without a jury, and a finding in favor of the defendant, with a judgment of nil capiat and for costs entered, from which plaintiff prosecutes this appeal.

While several pleas were filed, the defense relied upon was that the note was delivered to the plaintiff bank conditionally, that it should not be effective until twenty shares of the stock of the payee in the note, Austin Hospital Association, was delivered to the bank for the defendant.

On the trial plaintiff offered in evidence the note upon which the judgment was confessed. The note was endorsed

25375

Appellants

U. S. COURT

Appellants

2561A.604

Opinion filed March 5, 1930

THE COURT, after having read the opinion of the court.

On July 18, 1926, a judgment was rendered in a
 majority in favor of the defendant, the husband of a wife made
 by defendant to the order of which now had possession for
 the sum of \$1300, and by the order entered and delivered to
 the plaintiff her former husband. The amount of the judgment
 was \$1304.72, which included the husband's fees. In motion
 to set aside, supported by affidavit, he was not in to deny
 upon the merits, the judgment in the matter to stand as
 a majority.

There was a trial before the court at New York, July,
 and a finding in favor of the defendant, with a judgment of
 all money and for costs entered. From which plaintiff presented
 this appeal.

While several questions were raised, the defendant relying
 upon the fact that the note was delivered to the plaintiff bank
 voluntarily, that it should not be set aside until some
 amount of the stock of the bank is paid, which was
 consideration, was delivered to the bank for the defendant.

On the trial plaintiff offered in evidence the note
 upon which the judgment was rendered. The note was entered

"Austin Hospital Association by John P. Wallace, Treasurer." Counsel for plaintiff asked counsel for defendant this question: "You do not deny the signature on the note?" Defendant's counsel answered, "No, but we deny the execution of it, so that you will have to prove that." Counsel for plaintiff, "I take it the signature on the note is admitted." Counsel for defendant replied, "Yes, that is admitted by the pleadings; that is not denied." Then the court made this observation, "As I understand the law, the fact that they have the note in their possession, and the fact that you admit the signature, and it is proved that nothing has been paid on the note, makes it prima facie. You admit that there has been nothing paid on the note.", to which question of the court defendant's counsel answered "yes". Then the court said, "So that raises the presumption of delivery and proper execution."

Plaintiff then offered in evidence the cognovit which the court admitted. Counsel for plaintiff then said: "I would like to have it understood that on Exhibit 1, the power of attorney is also received.", to which counsel for defendant replied, "yes". The court then made this observation, "Surely, the entire document." whereupon the plaintiff rested his case.

Defendant was his only witness, and from his testimony it appears that in June 1926, he bought 20 shares of the common capital stock of the Austin Hospital Association for \$1500, from a salesman for the hospital named Kere, who negotiated the sale with him at his home. This was four days before the first note was signed. He paid Kere \$100 on account. Kere told defendant that the bank would deliver the stock. Afterwards defendant went to the bank and signed a note for \$1400. He said he signed the note at the first window in the bank, that he did not know the man he dealt with, would not know him if

he saw him, and did not go back to the bank since the suit was started to ascertain whether the man was still there. He told the man at the bank that he had bought stock of the Austin Hospital Association, and he had come down there to sign the note. He thinks the note was mailed to him and that he took it down to the bank to sign. The man gave him a note to sign, and then he inquired about his stock, and "me like a dummy, I did not expect to get it, and I asked for it, and he said the stock would be mailed to me." He did not say when, I had no talk with him after that time nor saw him thereafter. That is all defendant's testimony in relation to the transaction.

It appears from the evidence that the note was renewed four times and that judgment by confession was entered on the 5th note; that at the time defendant gave the fifth note he paid \$100 on account, reducing the amount of the indebtedness to \$1300. All the notes were payable to the Austin Hospital Association, and by them endorsed and delivered to the bank, so that in the ultimate result this was a speculation by defendant in 20 shares of the common capital stock of the Austin Hospital Association, which he bought for \$1500, paying \$100 at the time of the purchase and another \$100 at the time of the execution of the fifth note, which was the one upon which the judgment herein was confessed. It does not appear that defendant ever demanded his 20 shares of common stock from the Hospital Association or any one of its representatives. Defendant denied any recollection of signing any other note but the first one and the last. Defendant admitted that the signature on the note as maker was his. On cross-examination he was asked this question, "Did you ever see anybody at the Austin Hospital Association and ask them where your stock was?",

he was ill, and did not go out to the bank since he would not
attend to business in person. He was still there. He told
the man at the bank that he had brought a check of the bank
Hospital Association, and he had just come there to sign the
check. He showed the check and asked to see the man who had
it down to the bank to sign. The man gave him a note to sign,
and then he inquired about the check, and the man said,
I did not expect to get it, and I asked for it, and he said
the check would be signed by me. He did not say when, I had
no talk with him after that time nor saw him thereafter.
That is all information I have in relation to the transaction.

It appears from the evidence that the note was
received four times and that judgment by examination was rendered
on the 25th note; that at the time judgment was the 15th
note he was 1500 at home, receiving the check at the bank
address to 1500. All the notes were payable to the bank
Hospital Association, and by some amount and delivered to
the bank, so that in the amount to be paid this was a transaction
by deposit in the name of the Hospital Association of the
Bank Hospital Association, which he signed for 1500, making
1500 of the sum of the payment and making 1500 of the sum
of the amount of the 15th note, which was the sum
which the Hospital Association was obligated. It does not appear
that judgment was rendered on the 15th note at the time
from the Hospital Association to the man at the bank.
The man at the bank was not the man who had the note, and
the first was not the last. Judgment was rendered that the
signature on the note was what was said. In other words
he was asked this question, "Did you ever see anyone at the
Bank Hospital Association and did they have your name?"

to which question he answered "no sir".

Defendant thereupon rested his case.

The plaintiff in rebuttal called the president and cashier of the bank, both of whom testified that they had no knowledge of any selling of stock by the Hospital Association. The president of the bank testified in rebuttal that by an arrangement with Dr. Blaine W. Ramsay of the hospital, who was in charge of its finances, the bank would from time to time discount notes of the hospital, and inasmuch as the hospital was somewhat new as an institution, the bank would require a proper guarantee from the Hospital Association, which was furnished in the sum of \$10,000, covering all obligations of the hospital to the bank. Under this arrangement the practice of the hospital was from time to time to discount notes at the plaintiff bank.

It is apparent as a matter of law, at the conclusion of defendant's testimony the bank might have rested its case successfully without any further proof. The record may be searched in vain for any evidence that the note in suit was delivered to the bank conditionally. Whatever defendant may have said regarding the giving of the first note, it is patent that he made no effort to procure his stock from the hospital at any time, and from the time he purchased his stock until the entry of the judgment upon the note in suit, being a renewal of the original indebtedness for the fourth time, he made no effort to procure his stock. It is in evidence, however, that the hospital went into bankruptcy, and that it was without assets. Nevertheless, it may be assumed to have been solvent during most of the time that defendant was attempting to pay for his stock by renewing the original indebtedness contracted therefor, less the \$100 paid at the time of the

purchase of the stock and the \$100 paid at the time the note in suit was given.

There is no evidence of bad faith on the part of the bank and no evidence that it did not receive the note in suit in due course and without notice of any legal defenses thereto on the part of the defendant. While the learned trial judge ruled correctly upon the state of the law when he allowed the note to be admitted in evidence, he seems to have strayed away from the issues by reason of his sympathy being incited for defendant whom he characterized "as a poor victim of a stock selling proposition". A complete answer to that observation by the judge rests in the undeniable fact that there was no issue by pleading, affidavit or evidence, of "any stock selling proposition."

It is a presumption of law that the holder of negotiable instruments in the absence of evidence to the contrary is presumed to hold in due course for value and without notice of defenses. Kuolt v. Canright, 203 Ill. App. 502. And likewise where a promissory note is in the hands of a holder for value before maturity, the burden is on the person who attacks the title to show, by a preponderance of the evidence, that the bank was guilty of bad faith when it took title to the note. Clarke v. Newton, 235 Ill. 530.

To invalidate the title of the holder of a negotiable instrument challenging such right of an innocent holder in due course for value, it is necessary for a defendant to prove bad faith. Rothstein v. Grossberg, 222 Ill. App. 228.

In Kuolt v. Canright, *supra*, it was held that every holder of a negotiable instrument is presumed to be a holder in due course in the absence of evidence to the contrary."

Citing Clarke v. Newton, *supra*.

The court in Morey v. Simpson, 197 Ill. App. 55, held inter alia that the title of the holder of commercial paper for value and before maturity can only be defeated by evidence that such holder was guilty of bad faith in taking title to such note, and it is not enough to prove the existence of mere suspicion of defects in such title or that such holder at the time of taking such title knew of facts calculated to excite suspicion in the mind of a prudent man, or even that such holder was guilty of gross negligence at such time.

The evidence discloses that the bank was the holder of the note in suit as an innocent holder for value before maturity and without any notice of legal defenses thereto; that its title was acquired in good faith and that the transaction is free of any proof of bad faith on the part of the bank.

The difficulty with the trial judge in his determination of this case is that he did not try it upon the issues joined, but digressed and travelled a path not warranted by pleadings or evidence. His sympathies seemed to be aroused upon the theory that the hospital had indulged in a stock jobbing transaction and that defendant was duped thereby, and the finding and judgment of the trial court is the result of the court's sympathy with the defendant whom he characterized as a victim of the hospital's stock jobbing proposition. It is much more apparent from the evidence, which is not in dispute, that the defendant undertook to finance a \$1500 obligation for the purchase of 30 shares of the common

The court in *W. v. W.* held that the title of the holder of a negotiable instrument for value and without notice can only be defeated by evidence that such holder was guilty of fraud in taking title to such note, and it is not enough to prove the holder of such negotiation or holder of such title at the time of taking such title was guilty of fraud related to exercise manifested in the mind of a creditor, or even that such holder was guilty of fraud subsequent to such time.

The evidence disclosed that the bank was the holder of the note in suit as an immediate holder for value before maturity and without any notice of such holder's fraud; that the title was acquired in good faith and that the transferee in case of any fraud of the bank on the part of the bank.

The difficulty with the trial judge in his decision of this case is that he did not try to show the issue joined, but attempted to establish a fraud not supported by evidence on evidence. His reasoning seemed to be that upon the theory that the bank was innocent in a sense of being innocent and that defendant was guilty of fraud, the finding and judgment of the trial court is the result of the court's view that the defendant should be held responsible as a victim of the bank's fraud. The court's decision is in much more accord with the evidence, which is not in dispute, that the defendant was innocent in taking the obligation for the purpose of the purchase of the goods.

stock of the hospital on the modest sum of \$100, and that four times he ratified the transaction by renewing the note and that only on renewing the note in judgment did he pay another \$100.

The admissible and uncontradicted evidence in the record applicable to the issues joined in the action clearly entitled the plaintiff bank to maintain its judgment by confession. Therefore the judgment in this appeal of nil capiat of March 22, 1929, is reversed and the cause is remanded with directions to the Circuit Court to expunge its said judgment of March 22, 1929, from the record, and to reinstate the judgment by confession entered July 12, 1928, in favor of plaintiff and against defendant for the sum of \$1464.75. The costs here and below are taxed against the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

WILSON, P.J. AND RYNER, J. CONCUR.

stood at the bottom of the record book of 1900, and that
four times he testified the examination by treating the case
and that only on receiving the note in judgment did he pay
another \$100.

The plaintiff has introduced evidence in the
record applicable to the issues joined in the action clearly
entitled the plaintiff back to maintain its judgment by
contestation. Therefore the judgment in this appeal of
all points of error 28, 1928, is reversed and the case is
remanded with directions to the District Court to examine the
said judgment of error 28, 1928, from the record, and to
restate the judgment by contract entered July 18, 1928,
in favor of plaintiff and against defendant for the sum of
\$100.00. The costs here and below are taxed against the
defendant.

REVEREND JUD. HENRY W. HARRISON, J. DIRECTOR.

1928, 2-2, 1928, 1-10-28.

33766

BESSIE FISHER,

Appellee,

v.

CHAPPELL ICE GRATE CO.,
a Corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

256 I.A. 605'

Opinion filed March 5, 1930

MR. JUSTICE HOLCOM delivered the opinion of the court.

The record in this case is before us for review on an appeal by defendant from a judgment against it of \$1,000 entered on the verdict of the jury, after overruling defendant's motion for a new trial.

The scene of the accident was the intersection of Ashland Avenue and School Street, Chicago. The cause went to trial upon the declaration of plaintiff consisting of two counts and a plea by defendant thereto of the general issue.

The first count alleges in substance that on the 19th day of September, 1925, defendant by its agent operated a motor truck on Ashland Avenue in a southerly direction at or approaching the intersection of Grand Avenue with School Street; that plaintiff was in the exercise of due care; that she was a passenger in an automobile driven in a westerly direction along School Street. It is averred that it was the duty of defendant to operate its motor truck so as not to endanger the life of persons lawfully on the highway, but in violation of its duty so negligently and carelessly operated said motor truck that it was caused to collide with the automobile in which plaintiff was a passenger, and that as a direct result of such carelessness and negligence of defendant plaintiff suffered certain injuries

to her person. The second count charges as a specific act of negligence the violation by defendant of the state statute forbidding the driving of an automobile at a rate of speed exceeding 15 miles an hour in the residence district of a city.

Defendant assigns for error and argues for reversal that the evidence shows that defendant was not guilty of any negligence attributable to the accident, but that such evidence does show that plaintiff was guilty of negligence which approximately contributed to the collision; that the verdict is excessive, and that the court erred in refusing to give to the jury Instruction No. 4 tendered by defendant.

There is evidence in the record that one witness testified that when he first saw defendant's truck it was one-quarter of a block north of School Street coming south in Ashland Avenue, and that when the truck was that distance away, about one-quarter of a block, the car in which the plaintiff was riding had arrived at the east cross walk of School Street with its front entering Ashland Avenue. Another witness testified that he was on the sidewalk at the northwest corner of the intersection and from that point viewed the accident; that he saw the automobile in which plaintiff was riding on School Street coming west across Ashland Avenue; that when "it got over the car tracks" he then first saw the truck passing and that it ran "into the back of the automobile" in which plaintiff was riding. The driver of the automobile in which plaintiff was riding thought she was required to stop at streets on which car tracks are located; that she did stop when approaching said tracks and she and other witnesses likewise testified that when the front of plaintiff's automobile was just at or a little bit over the east cross walk of School

Street, defendant's truck was about 200 feet away, about a third of a block north of the crossing; that the driver of the automobile in which plaintiff was riding started across and her car "was completely over the car track" when it was struck in the rear by defendant's truck which did not slow down. Plaintiff testified that she saw the truck just as the car in which she was riding entered into Ashland Avenue, and that the truck was about a quarter of a block north of School Street, and that when she looked again the truck was not slowing down or changing its speed.

In contradiction of this testimony the driver of the defendant's truck testified that he saw the car in which plaintiff was riding, that when he saw it he was about 10 or 15 feet south of the north sidewalk of School Street, and that such car at that time had got to the west of the east sidewalk of Ashland Avenue when he first noticed it, and it is argued by plaintiff's counsel that if defendant's truck was 10 feet south of the north sidewalk of School Street when the car in which plaintiff was riding had not yet come to Ashland Avenue, the accident could not have happened, for the reason that the truck would have been entirely across the street before the automobile in which plaintiff was riding could reach the place of the collision.

Another witness for defendant, who was formerly in the employ of defendant and at the time he testified was driving for another ice cream company, testified that the automobile in which plaintiff was riding was travelling 25 or 30 miles an hour across the street just prior to the happening of the collision.

Street, defendant's truck was about 100 feet west, about
kind of a black north of the driveway; that the driver of the
automobile in which plaintiff was riding stopped across and
her car was completely over the curb and it was stuck
in the rear of defendant's truck which it got stuck down.
Plaintiff testified that when she came just as the car in
which she was riding stopped across defendant's driveway, and that the
truck was about a quarter of a block north of School Street,
and that when she looked again in the truck was not moving
down on School Street.

In contradiction of this testimony the driver of the
defendant's truck testified that he and the car in which plaintiff
was riding, that when he saw it he was about 10 feet in
front south of the north sidewalk of School Street, and that
even up to that time he did not see the car in which plaintiff
was riding. He testified that he first noticed it, and it is argued
by plaintiff's counsel that if defendant's truck was in fact
south of the north sidewalk of School Street when the car in
which plaintiff was riding first saw her car on School Street,
the accident could not have happened, for the reason that the
truck could have seen plaintiff's car and would have stopped the
automobile in which plaintiff was riding would have stopped the
at the collision.

"Another witness for defendant, who was formerly in
the employ of defendant and at the time he testified was driving
for another ice cream company, testified that the automobile
in which plaintiff was riding was travelling on an E. street
on Park Avenue the street just after the beginning of the
collision.

It is apparent from the foregoing recitation of evidence that it is in sharp conflict. The duty of reconciling the discrepancies in the testimony of the parties was the burthen and duty of the jurors. It was their duty to reconcile, if possible, these conflicts in the evidence and from the manner and appearance of the several witnesses in giving their testimony to conclude which of the witnesses were entitled to the greater credence, and in arriving at their verdict to give effect to the testimony of such witnesses as they believed testified to the truth, and on the other hand to discredit the testimony of such other witnesses whose testimony they disbelieved. If the jury believed the witnesses of plaintiff and disbelieved the witnesses of defendant, where their testimony was in conflict with that of the plaintiff, they had a right so to do, and if the testimony of plaintiff's witnesses taken alone is sufficient to justify the jury's verdict, then it is not the duty of this court to set such verdict aside unless it appears from all the evidence that the verdict is contrary to its probative force. We are of the opinion from a review of all the evidence that it is of sufficient probative force to warrant and sustain the verdict finding defendant guilty of the actionable negligence charged in the declaration.

Whether or not defendant's truck had the right of way is likewise a question of fact for the jury to decide.

In Heidler v. Wilson, 243 Ill. App. 89, in citing Partridge v. Eberstein, 325 *ibid.* 209 where the court said:

" ' Whatever the exact distance may have been, it is apparent that plaintiff's automobile was approaching the intersection of the highways from the right and that under the statute it was the duty of the defendant to give the right of way to plaintiff's automobile.' "

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the court adds:

"With that statement we are unable to agree, for reasons hereinafter referred to.

"In the same case the court also said that a vehicle might be said to be approaching the intersection from the right, within the meaning of the statute, and so entitled to the right of way over one approaching the intersection from the left, when the driver of the latter, in the exercise of due care, would or should see that, unless he yielded the right of way, the vehicles would or might collide. In passing on the question of whether due care was exercised by the drivers of the respective cars involved, two principal elements must be taken into consideration, namely, the relative positions of the two cars with respect to the intersection and their respective rates of speed. Usually the question of whether, in view of the relative positions of the two cars, with respect to the intersection, and their respective rates of speed, the driver of the car approaching the intersection from the left, should have seen that the cars would or might collide, unless he yielded the right of way, is one of fact for the jury to determine. Of course, like similar questions of fact, this may sometimes become one of law, but only where in the opinion of the court, all reasonable minds would reach the same conclusion.

"It would seem to be clear that the statute does not mean that the driver of a vehicle approaching an intersection must yield the right of way to one approaching the same intersection on his right, without regard to the distance that vehicle may be from the intersection when he reaches it or to the rates of speed at which the two vehicles are traveling. When the driver of a vehicle approaches an intersection and he sees another vehicle approaching from the right, at a greater distance from the intersection and at a speed such that, in the exercise of due care, he believes he will be across the intersection before the vehicle approaching from the right reaches it, then, in our opinion, the latter car is not one 'approaching from the right' within the meaning of the statute, and so as to require such driver to stop or yield the right of way. Whether, in exercising his judgment and going ahead, the driver exercised due care, is, we repeat, ordinarily a question for the jury to decide. Such would be the situation, in our opinion, where, as in the case at bar, the evidence showed that the collision occurred when the car approaching from the left had reached the middle of the intersection and the one approaching from the right had not then reached the middle of the intersection and where the car coming in from the left was struck in the rear by the front part of the car coming in from the right. In that situation, we believe it may not be said, as a matter of law, that the driver of the vehicle approaching from the left failed to exercise due care in believing that the car coming in from the right, not, having reached the intersection when he did, was sufficiently far away, that, considering the rates of

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speed of the two cars, he had time to cross the intersection before the other car reached his line of travel. In other words, in such a situation, we believe that it may not be said, as a matter of law, that the statute applied, and that the driver coming to the intersection from the left proceeded across at his peril. It was a question for the jury to decide on all the evidence."

In support of the foregoing dicta the court cited Salmon v. Wilson, 227 Ill. App. 286; Zapf v. Kuttan, 229 Ill. App. 408; Darling & Co. v. Yellow Cab Co., 238 Ill. App. 326; Owitz v. Chindbloom, 239 Ill. App. 674; Goldberg v. Philpott, 240 Ill. App. 669 and Boyda Dairy Co. v. Walsh, 242 Ill. App. 633.

From the foregoing recitation it is apparent in the situation confronting the parties in this case at the time of the collision, the party driving from the right did not necessarily have the right of way so as to absolve defendant from the negligence attributable to proceeding on the assumption that the driver of defendant's truck had the right of way. Under the circumstances in evidence the jury were justified in finding that the driver for defendant in proceeding upon the theory that he had the right of way under the statute, was negligence justifying the verdict of the jury in so finding.

Defendant argues that plaintiff was guilty of contributory negligence in not notifying the driver of the automobile in which she was riding of the impending danger of a collision. In the earlier days of automobile traffic it was in a few cases held that a passenger was not in the exercise of due care for his own safety if he failed to notify the driver of the car of approaching danger evident to him. Fianta v. Chicago City Ry. Co. 284 Ill. 246. However, this theory has since been exploded. Back seat drivers' activities have of late been condemned by the courts of review of this state. Hoffman v. Yellow Cab Co., 238 Ill. App. 269, in which the court said:

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... ..

Wilson v. Wilson, 202 Ill. App. 3d 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1171, 1172, 1173, 1174, 1175, 1176, 1177, 1178, 1179, 1180, 1181, 1182, 1183, 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1194, 1195, 1196, 1197, 1198, 1199, 1200, 1201, 1202, 1203, 1204, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1233, 1234, 1235, 1236, 1237, 1238, 1239, 1240, 1241, 1242, 1243, 1244, 1245, 1246, 1247, 1248, 1249, 1250, 1251, 1252, 1253, 1254, 1255, 1256, 1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268, 1269, 1270, 1271, 1272, 1273, 1274, 1275, 1276, 1277, 1278, 1279, 1280, 1281, 1282, 1283, 1284, 1285, 1286, 1287, 1288, 1289, 1290, 1291, 1292, 1293, 1294, 1295, 1296, 1297, 1298, 1299, 1300, 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1332, 1333, 1334, 1335, 1336, 1337, 1338, 1339, 1340, 1341, 1342, 1343, 1344, 1345, 1346, 1347, 1348, 1349, 1350, 1351, 1352, 1353, 1354, 1355, 1356, 1357, 1358, 1359, 1360, 1361, 1362, 1363, 1364, 1365, 1366, 1367, 1368, 1369, 1370, 1371, 1372, 1373, 1374, 1375, 1376, 1377, 1378, 1379, 1380, 1381, 1382, 1383, 1384, 1385, 1386, 1387, 1388, 1389, 1390, 1391, 1392, 1393, 1394, 1395, 1396, 1397, 1398, 1399, 1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1410, 1411, 1412, 1413, 1414, 1415, 1416, 1417, 1418, 1419, 1420, 1421, 1422, 1423, 1424, 1425, 1426, 1427, 1428, 1429, 1430, 1431, 1432, 1433, 1434, 1435, 1436, 1437, 1438, 1439, 1440, 1441, 1442, 1443, 1444, 1445, 1446, 1447, 1448, 1449, 1450, 1451, 1452, 1453, 1454, 1455, 1456, 1457, 1458, 1459, 1460, 1461, 1462, 1463, 1464, 1465, 1466, 1467, 1468, 1469, 1470, 1471, 1472, 1473, 1474, 1475, 1476, 1477, 1478, 1479, 1480, 1481, 1482, 1483, 1484, 1485, 1486, 1487, 1488, 1489, 1490, 1491, 1492, 1493, 1494, 1495, 1496, 1497, 1498, 1499, 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, 1508, 1509, 1510, 1511, 1512, 1513, 1514, 1515, 1516, 1517, 1518, 1519, 1520, 1521, 1522, 1523, 1524, 1525, 1526, 1527, 1528, 1529, 1530, 1531, 1532, 1533, 1534, 1535, 1536, 1537, 1538, 1539, 1540, 1541, 1542, 1543, 1544, 1545, 1546, 1547, 1548, 1549, 1550, 1551, 1552, 1553, 1554, 1555, 1556, 1557, 1558, 1559, 1560, 1561, 1562, 1563, 1564, 1565, 1566, 1567, 1568, 1569, 1570, 1571, 1572, 1573, 1574, 1575, 1576, 1577, 1578, 1579, 1580, 1581, 1582, 1583, 1584, 1585, 1586, 1587, 1588, 1589, 1590, 1591, 1592, 1593, 1594, 1595, 1596, 1597, 1598, 1599, 1600, 1601, 1602, 1603, 1604, 1605, 1606, 1607, 1608, 1609, 1610, 1611, 1612, 1613, 1614, 1615, 1616, 1617, 1618, 1619, 1620, 1621, 1622, 1623, 1624, 1625, 1626, 1627, 1628, 1629, 1630, 1631, 1632, 1633, 1634, 1635, 1636, 1637, 1638, 1639, 1640, 1641, 1642, 1643, 1644, 1645, 1646, 1647, 1648, 1649, 1650, 1651, 1652, 1653, 1654, 1655, 1656, 1657, 1658, 1659, 1660, 1661, 1662, 1663, 1664, 1665, 1666, 1667, 1668, 1669, 1670, 1671, 1672, 1673, 1674, 1675, 1676, 1677, 1678

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the results of review of these records. William W. Keller and Dr. J. Edgar Hoover, both of whom were present at the hearing, advised that the results of the review of the records of the William W. Keller and Dr. J. Edgar Hoover were as follows:

"A warning to the driver from a rear-seat passenger might well distract the driver's attention thereby tending rather to cause than to prevent such an accident."

As is aptly said in Hedges v. Mitchell, 69 Colo. 265:

"The rear-seat driver is responsible for enough accidents as the score stands without the aid of judicial precedent. The place for a passenger who knows better than the driver * * * when, where and how it should be operated is at the wheel."

In Metz v. Yellow Cab Co., 248 Ill. App. 609, it was said that a passenger is not required to be constantly "on the qui vive to prevent a servant of the carrier from acting carelessly in the management of a train, street car or cab. The observance of such a rule of law would place upon a passenger an intolerable and highly unjust burthen and would only tend to hinder and annoy the servant of the carrier in his control of the train, street car or taxicab, and tend rather to cause, than to prevent an accident."

In Noun v. The Chicago City Railway Co. 232 Ill.

378, the court made these observations:

"There has not been a scintilla of evidence pointed out which indicates that appellee could direct or control the movements of the wagon or the method of driving. The driver was in sole charge. This being the state of the record, we cannot agree with appellant's contention that the negligence of the driver, if any, would be imputed to appellee. Even if the negligence of the driver caused or contributed to the accident it would not excuse appellant for an injury to one who was without fault or negligence. Chicago and Alton Railroad Co. v. Vinond, 212 Ill. 199."

We are unable to concur with the contention of defendant that the award of damages is excessive. On the contrary, we think they are very meager for the injuries suffered by plaintiff as a result of the collision.

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we think that are very useful for the engineer and for the student as a reminder of the material.

Plaintiff testified that prior to the accident she was in good health, that she had worked as saleslady for several years and earned about \$40 a week; that at the time of the accident she was struck on the head over the right eye, and that she was thrown some how against the steering wheel with sufficient force to fracture two ribs, her knee was injured, and she was taken from the scene of the accident to Wieboldt's Store where a nurse bandaged her knee and leg; that when she got home she was nauseated and had severe pains in her left side and had difficulty in breathing; that the doctor was called the next day and found plaintiff in bed; that he bandaged up her chest with adhesive tape extending around her body; the cuts and bruises on her head over her eye bothered her for some time; she was in bed about two weeks and on account of dizziness she consulted Dr. Taylor who X-rayed her head to discover if her skull had been fractured, but the X-ray did not show any skull fracture; that soon after the accident she developed a temperature and had great difficulty in breathing; that pneumonia developed at the site of the fractured ribs, which kept her in bed a few weeks longer; that she was unable to attend her work until April after the accident.

The foregoing recitation, we think, refutes the contention that the damages awarded are excessive.

The action of the court in refusing to give Instruction No. 4. proffered by defendant is challenged by defendant as erroneous. The court gave three instructions tendered by plaintiff and 19 instructions at the request of defendant. It might be sufficient to say that the jury was sufficiently instructed by the instructions given. Numerically at least, defendant has no cause for complaint. Further, we might

Plaintiff testified that prior to the accident she

was in good health, that she had worked as a waitress for

several years and earned about \$15 a week; that at the time

of the accident she was living in the hotel where she was

and that she was living with her mother and sister

with sufficient force to maintain her life, and that she

and she was taken from the scene of the accident by ambulance

where a nurse bandaged her knee and leg; that when she

got home she was nauseated and had severe pains in her left

side and had difficulty in breathing; that the doctors who

called her next day and found her in bed; that she was bandaged

up her chest with adhesive tape and was given morphine

the first and second day and that she was given morphine

for some time; that she was in bed about two weeks and was unable to

discharge the contents of her bladder and was given morphine

discovery of her condition and was given morphine, but that she was

given any relief; that soon after the accident she

developed a temperature and had great difficulty in breathing;

that pneumonia developed at the side of the fractured ribs;

which kept her in bed a few weeks longer; that she was unable

to stand for some time after the accident.

The foregoing testimony, as given, shows that

conclusion that the accident caused the injuries.

The record of the court is sufficient to show that

the court is satisfied that the injuries were caused by

the accident. The court gave this instruction to the jury

and is satisfied that the instructions of the court are correct.

It is sufficient to say that the jury was sufficiently

instructed by the instructions given, and that the jury

deliberated and reached a verdict, and that the jury

refuse to pass upon the question because counsel have failed to set the instruction forth in its brief. However, we have examined the instruction and find it vulnerable to the objection made. Among other things, the instruction contained the following: "and if you find under the evidence in this action and under the instruction of this court that the plaintiff knew and appreciated the danger of collision in time to prevent it by promptly warning the driver of the automobile in which she was a passenger, it was her duty to do so, and her failure to remonstrate with or warn such driver would constitute negligence in this case."

We gather from what we have already said that the law under the facts in this case cast no duty upon the plaintiff to interfere in any way, by suggestion or otherwise, with the actions of the driver of the automobile. It would have been reversible error for the court to have given that instruction. In Vittum v. Drury, 161 Ill. App. 603, the judgment was reversed because it invaded "the province of the jury by telling them in effect that certain facts constituted contributory negligence and precluded a recovery." Whether or not plaintiff was guilty of contributory negligence was a question of fact for the jury and it would have been error for the court to have given Instruction No. 4, which in effect told the jury that the fact that plaintiff did not warn the driver of the automobile of impending danger prohibited a recovery.

Finding no reversible error in the record before us in this case, the judgment of the Superior Court is affirmed.

AFFIRMED.

WILSON, P.J. AND RYNER, J. CONCUR.

return to view upon the accident between himself and the
to set the location facts in the case. However, he has
examined the location and that it is necessary to the objec-
tion which, being correct, the location contained the
following: "and it was found that the evidence in this case
and under the location of this court that the possibility
know and associated the danger of collision in time to prevent
is by negligently turning the driver of the automobile in which
she was a passenger, if she had duty to do so, and her failure
to demonstrate with or without fault could constitute
negligence in this case."

The further fact that he has already said that the
law under the facts in this case is that the possibility
to interfere in any way, by negligence is established, with the
location of the driver of the automobile. It should have been
reversible error for the court to have taken those instructions.
In Wright v. State, 111 Ill. App. 2d 503, the judgment was
reversed because it reversed the verdict of the jury by
telling them in effect that certain facts constituted negli-
gently negligent and reversible error. It is not
not possible that the fault of contributory negligence was a
question of fact for the jury and it would have been error
for the court to have given instructions No. 1, which in effect
told the jury that the fault was entirely with the driver of
the automobile of the defendant. Reversible error.

Finding no reversible error in the record before us
in this case, the judgment of the appellate court is affirmed.
Affirmed, 111 Ill. App. 2d 503.

33798

JAMES E. KENNEDY,

Appellee,

v.

THE COWLES DETERGENT COMPANY,
a corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

256 I.A. 605²

Opinion filed March 5, 1930

MR. JUSTICE HOLCOM delivered the opinion of the court.

The cause went to trial upon the second amended declaration, which in its three counts inter alia charged:

That the defendant, The Cowles Detergent Company, (hereinafter referred to as the corporation), was a corporation engaged in the manufacture and sale, etc., of soap and other cleansing products; that on December 1, 1927, the defendant Carey was a servant of the defendant corporation for hire, in the capacity of a salesman, and as such, engaged in selling and marketing its wares, and that he did in behalf of himself and the defendant corporation operate divers motor vehicles over public highways in Cook County, in delivering its products and in calling upon and soliciting prospective buyers, consumers and other persons; that the defendants owned and operated a certain motor vehicle over divers highways in transporting divers salesmen, agents and employees of defendant corporation engaged in its business, etc.; that defendants did then and there invite the plaintiff to ride in said motor car, and that plaintiff did then and there, in the exercise of ordinary care for his own safety, in response to such invitation, ride in the same while the same was operated by defendants in transporting divers salesmen and agents of the defendant corporation; that as said motor vehicle operated by defendants in which

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Y. L. T. A. J. 1907

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Opinion filed March 5, 1950

... to maintain the position of the

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10. The following information is for your information only:

Declaration, which is in form similar to that of the

2. What are the main components of the system?

1-10-1960 (M. 10-10-60 and 10-10-60)

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— 207 —

will not be a source of trouble and is provided a good yield.

[illegible]

2017年1月1日

1990年12月11日 星期一 晴

Now, the total time in which to complete all initial work

It is to be understood that all the above are subject to change without notice.

100-443887-1000

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

1941年11月21日，在莫斯科，苏联政府向德国政府提出最后通牒，要求德国政府立即停止在波兰的军事行动，并撤退其军队。德国政府拒绝了这一要求，并于11月25日对苏联宣战。这一事件标志着第二次世界大战的全面爆发。

plaintiff was riding proceeded over Tuohy Avenue, the defendants wilfully, wantonly and recklessly caused it to be operated at a high and dangerous rate of speed and to forcibly and violently run into and strike against another motor vehicle moving in an opposite direction, and then to be forcibly and violently run off from the road and into a ditch, whereby plaintiff was forcibly and violently thrown and precipitated and greatly injured and damaged.

The second and third counts are much the same as the first, and count on the same accident, and charge wilful, wanton and reckless operation of the defendants' motor vehicle. In the third count it is charged that the motor car upset.

To the second amended declaration defendants interposed a general and special demurrer which was overruled. Both defendants then filed pleas of the general issue, and the corporation filed five special pleas, in the first of which it denied ownership or operation of the offending motor or that at the time of the accident it was used for transporting salesmen, agents and employees of said defendant in and about its business, etc.; that it did not invite plaintiff to ride in said motor vehicle and that at the time and place aforesaid said motor vehicle was not operated in defendant corporation's business.

The second, third, fourth and fifth special pleas of the corporation defendant are practically to the same tenor and effect in varying language as in its first special plea.

The cause was tried before court and jury, on the issues above outlined. When plaintiff rested its case both defendants in due form moved for an instructed verdict in their favor, which the court denied. Then again at the conclusion

of all the proofs and the parties had rested their case, both defendants moved for an instructed verdict in their favor. This motion the court denied as to the corporation and granted as to the defendant Carey. The cause thereafter proceeded against the corporation defendant, against whom there was a verdict of guilty with an assessment of damages at the sum of \$12,000, upon which the court, after overruling motions for a new trial and in arrest of judgment, entered a judgment, from which the defendant corporation brings the record to this court for review by appeal.

The main office of the corporation defendant was in Cleveland, Ohio, with a local office in Chicago, in charge of one J. W. Mordy, who was district salesman and who also had supervision and charge of the business outside of Chicago and contiguous thereto. Carey was in the employ of the corporation defendant as a salesman and a service man. The motor vehicle used by him in discharge of his duties was owned by Carey. He was paid \$250 a month with an allowance of ten cents a mile in Chicago and eight cents a mile on outside trips to cover the cost of gasoline, oil and upkeep of the motor. Carey kept the motor in his own garage and used it for his own pleasure as well as in his employer's business. His work was in Chicago and adjoining territory. Whether he discharged his duties in Chicago or outside was controlled by his employer, the corporation defendant. It is clear from the evidence that the corporation defendant never had title to the motor used in his employer's business. The ownership of the motor was in Carey. Furthermore Carey operated his own car. At the time of the accident it is undisputed that plaintiff was in the employ of the Chicago & Northwestern Railroad Company as a time keeper and material clerk. Carey and plaintiff had been friends for many years at

of all the records and the parties had wanted their own, and defendant never for an instructed verdict in their favor. This action the court denied as to the corporation and granted as to the defendant Gray. The court further proceeded against the corporation defendant, against whom there was a verdict of guilty with an assessment of damages of \$100,000, upon which the court, after overruling motions for a new trial and in view of judgment, entered a judgment, from which the defendant has petitioned bring the record to this court for review by appeal.

The main office of the corporation defendant was in Cleveland, Ohio, with a local office in Chicago, in charge of one J. W. Gray, who was district manager and who also had supervision and charge of the business affairs of Chicago and surrounding territory. Gray was in the office of the corporation defendant as a witness and a witness was. The motor vehicle used by him in Chicago at his office was owned by Gray. He was paid \$250 a month with an allowance of ten cents a mile in Chicago and eight cents a mile on outside trips to cover the cost of traveling, oil and upkeep of the motor. Gray kept the motor in his own garage and used it for his own pleasure as well as in his employer's business. His work was in Chicago and adjoining territory. He was in charge of his duties in Chicago on outside was controlled by his superior, the corporation defendant. It is clear from the evidence that the corporation defendant never paid him for the motor used in his employment. The ownership of the motor was in Gray. Consequently Gray operated his own car. At the time of the accident it is undisputed that plaintiff was in the employ of the Chicago & Northwestern Railroad Company as a fire engine and repairman. Gray and plaintiff had been friends for many years as

the time of his injuries received in the collision of Carey's motor with another going in an opposite direction, and tipping over into a ditch in which it fell as a result of the impact; plaintiff often rode in Carey's motor and they visited each other frequently.

Plaintiff was engaged to a young lady who lived in the same neighborhood as Carey, and for a few months prior to the accident he and the young lady visited the Careys about once every two weeks, had dinner there a number of times. As plaintiff expressed it, "they were socially intimate", and such friendship continued after the accident. On the evening preceeding the morning before the accident plaintiff and his young lady were at the Carey home.

On the day preceeding the accident and for several days prior thereto Carey had been calling on the laundry trade in Chicago with P. W. Williams of St. Paul, who was a salesman in the employ of Sterne & Malcy Company, jobbers of laundry supplies. In the afternoon they called at the Milwaukee Wet Wash Laundry located at 4120 Belmont Avenue, Chicago, of which laundry Joe Rizner was the proprietor. Rizner owned a roadhouse known as the "Chanticleer Inn" at 6100 Tuohy Avenue, and that day Carey and Williams called on Rizner for the purpose of soliciting an order for Escolite, a cleaning preparation used by laundries. Rizner testified that Carey wanted to know whether Rizner would give him an order for Escolite. He also testified that Carey was always wanting to visit his roadhouse; that he told Carey he was too busy to talk then, but if Carey wanted to come out to his roadhouse that night they might talk things over and see whether they could use some of what Carey sold. Williams and Carey both testified that after talking to Rizner

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On the day preceding the arrest and the arrest
days prior thereto Harry had been calling on the laundry woman
in Chicago with F. A. Williams of St. Paul, who was a salesman
in the employ of the St. Paul & Northern Pacific Railway
Company. In the afternoon they called at the St. Paul
Hotel, which was located at 4100 Belmont Avenue, Chicago, at which
hotel the St. Paul & Northern Pacific Railway Company had a rooming
house. In the afternoon they called at 4100 Belmont Avenue, Chicago,
known as the "Hotel Belmont", where they were met by
Harry and William called on them for the purpose of
collecting an order for laundry, a laundry order which was
by themselves. Harry testified that they went to the hotel
where they were met by him and ordered the laundry. He also testified
that they were always waiting to start the laundry, that he
told Harry he was not going to take any more laundry, but he never
in fact did to his knowledge that night they left the hotel
over and was ordered they would not come to that hotel again.
Williams and Harry both testified that they were not at the

about their product he gave them an order for a barrel of Escolite while they were at the laundry. Rizner asked Carey whether he was coming out to Rizner's roadhouse, and that Carey replied in substance that as Williams was a stranger with nothing to do they might go out that evening. The call at the Milwaukee Wet Wash Laundry was the last Williams and Carey made that afternoon. From there they went to the Fort Dearborn Hotel, where Williams was staying, about 6 o'clock; they washed up; while Carey was washing, Williams called Mordy, the sales manager, by telephone, and told him what they had done during the day. After that Carey also talked to Mordy. Carey said he told Mordy that they had sold Rizner during the day and were going out to see him at his roadhouse that night, and that Mordy told him to go home to his wife, which Mordy corroborated on the witness stand. Carey then called his home by telephone and talked with his wife. After that he talked to plaintiff who with his "fiances" was at the Carey home. Carey told plaintiff that they were going out to the roadhouse, asked him if he would like to go along, and that he said "yes"; that he had his girl there, but that he would take her home and meet Carey at the Haliburton Hotel at 10:30; Carey then said that he told plaintiff not to tell his wife, that she did not know where he was going. Following the talk with plaintiff Carey and Williams had dinner and then proceeded to the Haliburton Hotel on the north side where they met plaintiff. Following the talk plaintiff took his young lady home and then went to the Haliburton Hotel where he met Carey and that Carey and no one else invited him to go with him; that was about 10:30 o'clock at night; that he thereupon got into Carey's automobile, it was a Buick, and they started out; plaintiff sat in the front seat with Carey and Williams sat in the rear seat.

about their presence he gave them an order for a search of
records while they were at the country. Garry asked Garry
whether he was coming out to Garry's residence, and Garry
Garry replied in answer that he was coming, and Garry
with nothing to do that night he went to bed. The call
at the residence was made tomorrow was the first William and
Garry made that afternoon. From there they went to the
Postoffice Hotel, where William was staying, about 6 o'clock;
they worked up while Garry was washing. William called Garry,
the same morning, by telephone, and told him that they had
done during the day. After that Garry also talked to Garry.
Garry said he told Garry that they had with them during
the day and were going out to see him at his residence that
night, and that Garry told him to go down to his wife's
Garry corresponded to the witness about. Garry then called
his home by telephone and talked with his wife. After that he
talked to Garry with the witness. As at the Garry
home. Garry told Garry that they were going out to the
ready-made, asked him if he would like to go along, and that
he said "yes"; that he had his first time, but that he would
take her home and went down at the Hamilton Hotel at 12:30;
Garry then said that he told Garry not to tell the wife,
that she did not know where he was going. Following the talk
with Garry and William had dinner and then proceeded
to the Hamilton Hotel on the next side where they was
Garry. Following the talk Garry took his young lady
home and then went to the Hamilton Hotel where he met Garry
and that Garry and he was also invited him to go with him; that
was about 10:30 o'clock at night; that he conversed but late
Garry, "supper," it was a talk, and they started out;
plaintiff and in the room with Garry and William and

Carey and Williams testified that when plaintiff got into the car he asked about drinks, and that they went to a drug store on Lunt street where they bought a pint of whiskey; that while they were at the drug store they had a drink of brandy; afterwards they left the drug store and drove to the roadhouse; that they had one drink a piece on their way; that they got to the roadhouse about eleven o'clock or a quarter after, where they met Rizner, who showed them around the place; that while they were at the roadhouse there was no talk between them and Rizner about Escolite, except that they told him they had also sold to the American Wet Wash Company two blocks from Rizner's place.

Plaintiff testified that Carey told Rizner that he had come out to see him because he had been invited, that he had been too busy during the day and wanted him to buy a barrel of Escolite and that Rizner had said he was not sure he wanted it, but said all right, he would take an order for a barrel of it. Plaintiff's story was corroborated by Rizner.

They remained at the roadhouse about an hour and a half, until about 12:30 in the morning. While there they had something to eat and Carey and Williams testified they had a few drinks. This plaintiff denied, and denied that he drank anything, but Carey and Williams testified that he did drink. All three of them testified none was under the influence of liquor. While they were at the roadhouse some couples came in and Williams and Carey testified that some one remarked that they did not have any girls; that Rizner then said "Carey knows where to get them", and that they said "let's go". Carey also testified that Rizner said "Carey knows a place on Kenmore Avenue", and that he replied, "yes, I know", and that plaintiff and Williams said "we'll go there"; that when they left the road house they started for that

They immediately notified him when they went
into the way he asked about them, and that they went to a
store on that street where they bought a pair of shoes; that
after they went to the store they had a drink at a bar;
afterwards they left the store and went to the restaurant;
that they had one drink - where on their way, that they
to the restaurant about eleven o'clock of a certain night, where
they met a man, who showed them around the place; that while
they were at the restaurant there was no talk between them and
that about twelve, a man came and told him that he had also
come to the restaurant and that he had a drink from a man's
place.

Immediately notified him when they went to a
store on that street where they bought a pair of shoes; that
after they went to the store they had a drink at a bar;
afterwards they left the store and went to the restaurant;
that they had one drink - where on their way, that they
to the restaurant about eleven o'clock of a certain night, where
they met a man, who showed them around the place; that while
they were at the restaurant there was no talk between them and
that about twelve, a man came and told him that he had also
come to the restaurant and that he had a drink from a man's
place.

They remained at the restaurant about an hour and a half,
until about 11:30 in the morning, when they left and went
to get out of the restaurant and that they had a drink at a bar;
afterwards they left the bar and went to the restaurant;
that they had one drink - where on their way, that they
to the restaurant about eleven o'clock of a certain night, where
they met a man, who showed them around the place; that while
they were at the restaurant there was no talk between them and
that about twelve, a man came and told him that he had also
come to the restaurant and that he had a drink from a man's
place.

place, while plaintiff denied knowing anything about the place. They all left the roadhouse together in Carey's car. Plaintiff testified that as they left the roadhouse Carey seemed to be driving all right; that he was apparently driving the car carefully and the way a person ordinarily did; that prior to the time they got there, the place where the accident occurred, McCormick Boulevard and Touhy Avenue, he and Carey were talking like men will talk when riding along together, and that up until 100 or 150 feet from the place of the accident, Carey seemed to be driving all right; that they were coming along at a moderate rate of speed, about 30 or 35 miles an hour; that plaintiff did not pay any attention to the colliding car until it was about 100 or 200 feet away; that then Carey's car seemed to go directly towards the other car across the north side of the road in a rather straight line; that he would not say it was a quick or sudden turn, that it seemed to be on an angle.

Fritchek, the driver of the colliding car, testified that he was going west at the time and when he first noticed Carey's car it was about 200 yards away, the head lights on both cars were burning; that he was going from 35 to 30 miles an hour on the right hand side of the road, and did not think the other car was coming any faster; that the road was very narrow with a deep ditch on either side of it; that as he drove west the lights on the other car in his face attracted his attention, and he noticed the light was getting more directly in his eyes, and thinking his head lights were on and they were trying to attract his attention, he looked and saw that he had his dimmers on; in the meantime the cars were getting closer together; that he speeded up a little to get ahead of Carey's car so that the cars would pass, but did not succeed; that Carey's left front wheel struck his left rear wheel; Carey's car ran into the ditch on

place, while plaintiff looked toward anywhere about the place. They all left the residence together on May 1st, 1900. Plaintiff testified that as they left the residence they seemed to be driving all right; that he had suddenly leaving the car away fully and the way a person ordinarily did; that prior to the time they got there, the time when the accident occurred, defendant however, and today evening, he and plaintiff were talking like men all time when riding along together, and that of which 100 or 150 feet from the place of the accident, they seemed to be driving all right; that they were coming along in a moderate rate of speed, about 20 or 25 miles an hour; that plaintiff did not pay any attention to the colliding car until it was about 100 or 200 feet away; that then plaintiff's car seemed to be directly towards the other car, under the words, this at the time in a rather strict line; that he would not say it was a strike or sideswipe, that it seemed to be an angle.

Further, the driver of the colliding car, testified that he was going west at the time and when he first noticed Gary's car it was about 200 yards away, the head lights on both cars were burning; that he was going from 15 to 20 miles an hour on the right hand side of the road, and did not think the other car was coming up behind; that the road was very narrow and they kept their car either side of it; that as he drove near the light on the other car in his line extended and straight, and he noticed the light was getting more directly in his eyes, and thinking the head lights were on and they were trying to attract his attention, he looked and saw that he had his hands on; in the meantime the cars were getting closer together; that he stopped up a little to get a look at Gary's car so that the cars would pass, but did not succeed; that Gary's car went straight struck his left rear wheel; Gary's car was into the ditch on

the north side of the street.

Carey in describing the accident, testified that when the cars got about 25 or 30 feet from each other something happened to his car, that as they came along there was a sort of a lurch; that he tried to get the car straight and hold it on the road but was unable to do so and struck the rear end of the other car; that he did not anticipate that anything was going to happen, but that he lost control of the car, he did not know in what way, it may have been the throwing of a tire, but he did not know whether that was what it was. It all happened so quickly it was hard for him to remember the details.

Williams testified that just before they met the other car there was a swerve and the cars came together in the center of the highway; that he did not know what happened then as he was hurt. When the car went into the ditch plaintiff was injured.

Upon rebuttal plaintiff produced a written statement signed by Carey in which statement he said they drove to the roadhouse where they met Rizner, that they made a sale to him and left about one in the morning, and did not have anything to drink during the evening. Carey said that he made this statement of his own volition in order to protect himself, but said that the fact was that the order for Escolite was actually given at the laundry and that he had had some drinks both before and after he got to the roadhouse.

It is assigned and argued for error that the trial court erred in refusing to instruct the jury to find the corporation defendant not guilty, and in overruling the motion for a new trial, and in entering judgment on the verdict.

All of the counts of the amended declaration on which

the north side of the street.

They are describing the conditions, including their own

the way they found it at 10 feet from the street.

happened to him that they were about 10 feet from the street

of a house; that he tried to get the car started and held it

on the road but was unable to do so and returned the car and it

the other way; that he did not believe that anyone was going

to happen, but that he lost control of the car, he did not know

in what way, it may have been the steering or a slip, but he

did not know whether that was true or not, it is all possible

no doubt it was true for him to remember the details.

Witness testified that John Hudson was the driver

and there was a witness at the time when the car was

of the accident; that he did not know what happened then or he

was hurt. When the car went into the ditch, it was injured.

Upon request, witness produced a written statement

signed by him in which statement he said they drove in the

roadhouse where they met first. That they made a left turn to him

and left about one in the morning, and he has been thinking to

since about the accident. They said that he knew this statement

of his own volition in order to protect himself, but that they

the fact was that the car for accident was actually driven by

the accident and that he did not know where the car was after

he got to the roadhouse.

It is suggested and stated for error that the trial court

error in refusing to instruct the jury to find the defendant

defendant not guilty, and in withdrawing the verdict for a new trial.

and in entering judgment on the verdict.

All of the errors of the accused were corrected on appeal.

the cause went to trial, charge wilful, wanton and reckless conduct in the operation of the motor vehicle in which plaintiff was riding at the time of the accident.

There is not one scintilla of evidence of any wanton, wilful or reckless operation of the motor vehicle at any time at or before the accident, and plaintiff testified that he and Carey were talking just before the accident, and that Carey seemed to be driving all right; that they were coming along at a moderate speed and then just before the collision Carey's car seemed to be going directly toward the approaching car in a rather straight line, and that he could not say it was a quick or sudden turn the car took, but it seemed to be on an angle.

When the court instructed a verdict in favor of Carey, the co-defendant of the corporation defendant, it certainly absolved Carey from any and all negligence, wanton, wilful or reckless, and as all that the corporation defendant could be held for was the conduct of Carey, who being absolved by the court's instruction from every charge against him in the operation of the car at the time of the accident, and the corporation defendant being an artificial person could do no act of its own volition but is chargeable only with the acts of its representatives, it logically follows that the corporation defendant was likewise exculpated from the charge of wilful, wanton and reckless conduct, because it could only be guilty of such conduct by the action of its co-defendant Carey. It is therefore patent that if it was proper to give the instruction as to Carey, it should have been given also as to his co-defendant. Furthermore, the title of the motor vehicle used by Carey in the performance of his duties as salesman for his co-defendant,

4-11-64: ya to continue to utilizing the son of 17-11-64

To reveal us to bring a laboratory. James was not

Furthermore, the trial of the water remains used by Gary in the performance of his duties as witness for his co-defendant, such conduct by the action of the co-defendant Gary. It is stated and proven against, because it would only be guilty of such conduct by the action of the co-defendant Gary. It is therefore stated that it is proper to give the instruction as to Gary, it should have been given also to his co-defendant. Furthermore, the trial of the water remains used by Gary in the performance of his duties as witness for his co-defendant, such conduct by the action of the co-defendant Gary. It is stated and proven against, because it would only be guilty of such conduct by the action of the co-defendant Gary. It is therefore stated that it is proper to give the instruction as to Gary, it should have been given also to his co-defendant.

never was in the corporation defendant, but always was in Carey. On this point there is no dispute. Moreover there is no evidence in the record that it was within the scope of Carey's duties to his employer to invite third persons to ride with him in his motor. Plaintiff was not connected with Carey's employer in any way, shape or manner, and when Carey allowed the plaintiff to ride in his motor, he took him along as a friend for companionship. Under these facts and circumstances it is well settled in law that there could be no recovery, and that plaintiff had no right of action whatever against Carey's employer. When plaintiff, Carey and their companion Williams left the roadhouse after one o'clock in the morning, just prior to the accident, they had been drinking according to the evidence of Carey and Williams, and they were not going home, but to a place on Kenmore Avenue where there were some girls. Carey was certainly not engaged, nor was either the plaintiff or Williams engaged, in the business or affairs of Carey's employer. It is claimed that Carey sold a barrel of Escolite at the roadhouse to Rizner, although it would appear that that sale was made at Rizner's laundry before going out to the roadhouse, but be that as it may, after the party left the roadhouse they certainly were not engaged in any way about the affairs of Carey's employer.

In Golling v. Noll Baking & Ice Cream Co. 326 Ill. App. 134, the plaintiff, a minor, was invited by a truck driver of the defendant to ride with him, and while so doing was injured because of negligence on the part of the driver. Suit was brought against the defendant to recover damages for the injuries which the minor sustained. It was claimed that the negligence of the driver in operating the truck at a high rate of speed made his employer liable for the minor's injuries, and the employer claimed that it was immaterial whether the minor was riding by invitation of the

never was in the corporation's employment, and always was in
Navy. On this point there is no dispute. However, there is
no evidence in the record that it was within the scope of
Navy's duties to his employer to invite such persons to ride
with him in his motor. If Navy's duties were not commensurate with
Navy's position in the Navy, it was not his duty, and Navy
allowed the plaintiff to ride in his motor, he was not
in a position of responsibility. Under these facts and circum-
stances it is well settled in law that there could be no
negligence, and that plaintiff had no right of action whatever
against Navy's employer. When plaintiff, Navy and the
commissioner visited the restaurant after the accident in
the morning, just after the accident, they had been drinking
according to the evidence of Navy and plaintiff, and they were
not sober, and so a person as sober as Navy was when they
were seen after the accident was not negligent, but was
rather too negligent or careless in the premises of
Navy's employer. It is claimed that Navy was a
member of plaintiff's household at the time of the accident, and
would expect that they were with plaintiff's family before
going out to the restaurant, and he was as it was, after the party
left the restaurant they continued with him in the car
about the time of Navy's accident.

AN AFFIDAVIT OF DEFENSE AND ANSWER. And all this
is, the plaintiff, a clerk, was invited by a drunk driver of the
defendant to ride with him, and while he was in the car he was
of negligence on the part of the driver. But was plaintiff negligent
the defendant is never shown for the plaintiff when the
same happened. It was claimed that the plaintiff was of the driver
in operating the truck at a high rate of speed with the employer
liable for the driver's negligence, and the employer claimed that it
was not liable because the driver was acting in violation of the

driver or at his own request; that the driver in permitting the minor to ride under either of such circumstances was acting beyond the scope of his employment, and that therefore the employer was not liable, even though the minor's injuries were the result of the driver's negligence. The court in holding that the employer could not be held liable cited Scott v. Peabody Coal Co., 153 ibid. 103, in which it was said:

"So in this case whether appellee was riding by invitation of the driver or at his own request, the same was entirely outside of the driver's employment and beyond the scope, as shown by the evidence, of appellant's business and appellant therefore cannot be held liable for appellee's injuries even though they were occasioned by the driver's negligence."

In Brewing & Malting Co. v. Huggins, 96 ibid. 144, it was said:

"An act done by a servant while engaged in his master's work, but not done as a means or for the purpose of performing that work, is not an act of the master." Bowler v. O'Connell, et al. 38 N. E. Rep. 498.

And there is no implied authority in the servant to invite or permit a third person to ride in a vehicle in his charge, and if in so doing such third person is injured through the negligence of the servant, the master will not be liable as the servant is not acting within the scope of his authority. There are many authorities to be found in the books to a like effect in other jurisdictions.

The doctrine of respondent superior has no application to the facts in the case at bar, as there never was any liability on the part of the master, the corporation defendant, to the plaintiff.

The court erred in not instructing the verdict as requested to find both defendants not guilty, and therefore the judgment in this appeal against The Cowles Detergent Company is reversed, and as there can be no recovery against it, if we should award a new trial, the cause is not remanded.

REVERSED.

WILSON, F.J. AND RYNER, J. CONCUR.

driver or of his employer; that the driver is responsible for
the accident to the extent of his negligence and that the
employer is not liable, even though the driver's negligence was
the result of the driver's negligence. The court is divided that
the employer would not be held liable under Scott v. Shepherd.

Scott v. Shepherd, 107, is cited in this case.

"It is to be noted that the driver was injured by
the negligence of the driver or of his employer, and
the court is divided on the question of the driver's liability
and beyond the scope, as shown by the evidence, of
apparent negligence and apparent negligence, the driver
is held liable for negligence, and the driver's negligence
they were negligent in the driver's negligence."

In Scott v. Shepherd, 107, is cited in this case.

and said:

"It is to be noted that the driver was injured by
the negligence of the driver or of his employer, and
the court is divided on the question of the driver's liability
and beyond the scope, as shown by the evidence, of
apparent negligence and apparent negligence, the driver
is held liable for negligence, and the driver's negligence
they were negligent in the driver's negligence."

and there is no liability on the part of the driver to

invite or permit a third person to ride in a vehicle in his
charge, and it is so held, even though the driver is
not negligent of the driver, the driver is not liable for
the driver's negligence, even though the driver is not negligent.
There are many authorities to the effect that the driver is
not liable for the driver's negligence.

The doctrine of Scott v. Shepherd has no application

to the facts in this case, as the driver was not negligent
on the part of the driver, the driver is not liable for
the driver's negligence.

The court is divided on the question of the driver's liability

as to the driver's negligence, and therefore the judgment
in this case against the driver is reversed, and the driver is
not liable for the driver's negligence, and the driver is not
liable for the driver's negligence.

34035

CITIZENS TRUST & SAVINGS BANK,
a Corporation,

(Complainant) Appellee,

v.

ANNE BLAIR, et al,

Defendants.

Appeal of Oliver F. Smith and
Catherine C. Smith, (Defendants)
Appellants, from Interlocutory
Order Appointing Receiver.

INTERLOCUTORY APPEAL

FROM CIRCUIT COURT

COOK COUNTY.

256 I.A. 605³

Opinion filed March 5, 1930

MR. JUSTICE HOLDOM delivered the opinion of the
court.

This is an interlocutory appeal from an order appointing a receiver, which is here for the second time. In the former case No. 33687, the interlocutory order was reversed because the Chicago Title & Trust Company, trustee in the trust deed sought to be foreclosed, had not been made a party to the suit. That error has been corrected by an order granting leave to make the Chicago Title & Trust Company an additional party defendant.

The merits of the cause are not before us on this appeal. The only questions projected into the cause by this appeal are of the jurisdiction of the court and the integrity of the interlocutory order involved in this appeal. The trust deed sought to be foreclosed is subject to a prior and past due mortgage securing the sum of \$10,000 which is a paramount lien to that of the trust deed sought to be foreclosed in this proceeding. The trust deed in this appeal pledged the rents as security for the indebtedness secured by said trust deed.

On October 1, 1929, on complainant's motion the court appointed C. H. Penikoff receiver of the mortgaged premises, conditioned upon his filing his bond in the penalty of \$1000 with surety to be approved by the court, and further conditioned upon complainant filing the bond prescribed by statute in the penalty of \$2,000 with surety to be approved by the court. From the order so appointing Penikoff receiver this interlocutory appeal was prayed and allowed.

It is assigned inter alia as error "that said Circuit Court erred in appointing said receiver upon complainant's filing bond of \$2000 without any time being specified in said order within which said bond was to be filed."

If this was a matter of first impression, and this court had not in the first and second divisions thereof decided the contention here presented, holding that it was error in the court in not fixing a time certain for the filing of complainant's bond, we might feel constrained to hold that the order in this regard was not erroneous. However, this court has spoken decisively upon this matter in Lichtstern v. J. Rosenbaum Grain Co., 178 Ill. App. 250, and again in Frank Blaurock et al. v. Gabel Packing Co., No. 33860 filed July 8, 1929, not yet reported. These cases involved an order substantially in the form of the one in this appeal, in which the complainant was ordered to file a statutory bond without fixing any time in which such bond should be filed. In the case last supra the court said:

"Complainants have not yet furnished such a bond, and as the injunction is not effective until a bond is filed, the question arises, is the order appealable?

On October 1, 1959, an amended complaint was filed in the court
captioned U. N. Lathrop Receiver of the Northwest Terminal,
captioned with his filing his bond in the sum of \$1000
with surety to be approved by the court, and further amended
upon complaint filing was held as required by statute in
the sum of \$1000 with surety to be approved by the court,
from the order to appointing Lathrop Receiver this order
locusts should be stayed and allowed.

It is ordered that this order be stayed until the court
has acted in accordance with the provisions of the
filing bond of \$1000 without any time being specified in this
order within which said bond was to be filed.

It was a matter of time, however, and this
court has not in the first and second decisions to any decision
the question has presented, holding that it was error in
the court is not giving a time certain for the filing of com-
plainant's bond, as right feel concerned to hold that the
order in this regard was not erroneous. However, this court
has spoken definitively upon this matter in 1959 v. 1,
1959 v. 1, 1959 v. 1, 1959 v. 1, and again in 1959
1959 v. 1, 1959 v. 1, 1959 v. 1, 1959 v. 1, 1959 v. 1,
1959, and the question. These cases involved an order sub-
stantially in the form of the one in this case, in which
the complainant was ordered to file a satisfactory bond within
fifty days after the date when bond should be filed. In the
case last cited, the court said:

"Complainant has not yet furnished such a bond,
and as the injunction is not effective until a bond
is filed, the question arises, in the event complainant

While it is true that the record shows that the order is not yet effective, yet it purports to be an interlocutory injunctive order and the test of its appealability should not be its effectiveness in operation but whether the court properly entered such an order. Section 133 of the Practice Act provides that an appeal is allowed 'whenever an interlocutory order or decree is entered in any suit pending * * * granting an injunction.' Furthermore, the statute provides that such appeal must be taken 'within thirty days from the entry of such interlocutory order or decree and is perfected in said Appellate Court within sixty days from the entry of such order or decree.' Defendants were therefore obliged to take their appeal within thirty days from May 10, 1929, when the order was entered. If they had deferred doing this until after the thirty days had expired, they would have lost their right of appeal, which is purely statutory. We hold that the propriety of the temporary injunction may be considered by us upon appeal regardless of whether or not it is effective.

"In Lichtstern v. J. Rosenbaum Grain Co., 176 Ill. App. 250, a similar injunction order was under consideration and held erroneous, the court saying that, as the order did not require the complainant to file the bond within any fixed time, it was therefore entirely optional with him when, if ever, the injunction should become effective; that thereby the complainant was delegated the power to decide whether the need for a preliminary injunction was urgent or otherwise.

"We hold that the order is erroneous in not fixing a time certain within which the complainants should file the bond required by the order."

The foregoing reasoning is equally applicable to the case at bar. We are of the opinion that the foregoing decisions establish the law of the case in this Court and should be and is adhered to in the case at bar.

For the foregoing reasons the interlocutory order of October 1, 1929, is reversed.

REVERSED.

WILSON, P.J. AND RYNER, J. CONCUR.

33431

MILWAUKEE-EASTERN STATE BANK,
a Corporation,

APPELLANT,

v.

EDMUND G. BRUST,

APPELLEE.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

256 I.A. 605⁴

Opinion filed March 5, 1930

MR. JUSTICE RYNER delivered the opinion of
the court.

On October 11, 1927, the plaintiff obtained a
judgment by confession, on a promissory note, for \$563.68
against the defendant, in the Circuit Court of Cook County.
The judgment was later opened and the defendant allowed to
plead. On December 21, 1928, the case came on for trial
before the court, without a jury, upon the plaintiff's
statement of claim and the defendant's affidavit of merits
and two amended pleas. During the trial of the cause, the
defendant, by leave of court, filed a third amended plea.
There was a finding and judgment in favor of the defendant
and the plaintiff has perfected this appeal.

In his affidavit of merits, the defendant stated,
under oath, that Sol E. Bloch falsely and fraudulently
represented that the note in question was received in pay-
ment for five shares of the capital stock of the State
Discount Company; that before the execution of the note,

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Opinion filed March 2, 1930

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On October 11, 1937, the plaintiff did issue a judgment by default, on a preliminary note, for \$250.00 against the defendant, in the default of said County. The judgment was later entered, and the defendant allowed to stand. On December 11, 1938, the case came on for trial before the court, showed a jury, upon the plaintiff's statement of claim and the defendant's affidavit of denial, and was returned a verdict for the plaintiff, the defendant, by leave of court, filed a writ of habeas corpus, and the plaintiff was ordered to pay costs.

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which bore date of May 19, 1927, Bloch stated to the defendant that the State Discount Company was solvent, that the stock was worth the money, and that Bloch would deliver to the defendant the stock if the latter executed the note; that Bloch, at the time the note was signed, knew that the State Discount Company was insolvent; that Bloch "falsely and fraudulently" promised the defendant that the note "would not be delivered to or received by any one until after its maturity;" that on, to-wit, May 19, 1927, Bloch "falsely and fraudulently" induced August Saule to endorse the note in order to make it appear that Saule was an innocent purchaser for value before maturity; that Saule never had possession of the note, paid no consideration for it, but acted as a figurehead for Bloch and the State Discount Company and that, subsequent to the execution of the note, Bloch became the president of the plaintiff.

It is further stated in the affidavit that the plaintiff, when the note was delivered to it, had knowledge of the matters set out in the affidavit above recited; that the defendant, "confiding in the false and fraudulent representations aforesaid," executed the note without receiving any consideration for so doing and that the note "was then and there fraudulently endorsed by the said August Saule and then and there afterwards, delivered by the said Vol W. Bloch" to the plaintiff.

The first amended plea alleged that on May 19, 1927, Bloch was the president of the plaintiff bank; that he warranted and represented that the State Discount

which bore date of May 15, 1937, - does state to the
defendant that the State Discount Company was insolvent,
that the check was worth the money, and that it was
delivered to the defendant, the check is not being
the note; that when, at the time the note was signed,
knew that the State Discount Company was insolvent; that
Black "intentionally and fraudulently" procured the defendant
that the note "would not be delivered to or received by
any one until after the maturity;" that on, to-wit,
May 15, 1937, Black "intentionally and fraudulently" procured
against him to enforce the note in order to make it known
that this was an important matter for the State
maturity; that while never had possession of the note,
paid no consideration for it, but acted as a signatory to
Black and the State Discount Company and that, inasmuch
to the execution of the note, Black became the creditor
at the maturity,
it is further stated in the affidavit that the
plaintiff, when the note was delivered to it, had knowledge
at the maturity and not at the maturity when it was
that the defendant, "intentionally and fraudulently"
procured the note from
receiving any consideration for the note and that the
note "was then and there intentionally procured by the said
defendant, Black and the State Discount Company, and that it
was not a note" as the plaintiff,
The first paragraph of the affidavit filed on May 15,
1937, Black was the president of the plaintiff bank; that
he represented and represented that the State Discount

Company, of which he was also president, was solvent and the shares of stock were worth a large sum in excess of the amount of the note; that upon the sole consideration of the warranties, made by Bloch, the defendant executed the note and delivered it to Bloch, but that the stock was not of the value it was represented to be; that the corporation was insolvent and its stock worthless; that Bloch assigned the note to Saule, who knew that the consideration for the note had failed and that the note was worthless; that subsequently Bloch procured Saule to endorse and deliver the note to the plaintiff; that Bloch was then the president of the plaintiff and knew of and was connected with the transaction; that Bloch was the "essential representative" of the plaintiff, and that the plaintiff, through its representative "had notice of the said failure of consideration and is and was not a bona fide holder of said note."

The second amended plea set up a failure of consideration in general language; that Saule knew of the failure of consideration and that the note was worthless; that Bloch was the essential representative of the plaintiff in the transaction and that, therefore, the plaintiff had notice of the failure of consideration and was not a bona fide holder of the note.

The third amended plea, filed during the progress of the trial, alleged that Bloch obtained the note "by the use of fraud and circumvention" in that he falsely represented to the defendant that the note was in payment for five shares

Company, at which he was also present, was advised that the notes of stock were worth a large sum in excess of the amount of the note; that upon the note consideration of the transaction, made by Block, the defendant examined the note and delivered it to Block, but that the stock was not of the value it was represented to be; that the corporation was insolvent and its stock worthless; that Block assigned the note to B. B. B., who knew that the corporation for the note had failed and that the note was worthless; that subsequently Block procured a note to a doctor and deliver the note to the plaintiff; that Block was then the president of the plaintiff and knew of and was connected with the transaction; that Block was the defendant; that the plaintiff, at the plaintiff, and that the plaintiff through the representative of the plaintiff of the said letters of consideration that is that was not a valid holder of said note."

The second sentence was set up a failure of consideration in general language; that said knowledge of the failure of consideration and that the note was worthless; that Block was the defendant representative of the plaintiff in the transaction and that, therefore, the plaintiff had notice of the failure of consideration and was not a bona fide holder of the note.

The third sentence was, that under the provisions of the law, alleged to be Block obtained the note by the use of fraud and misrepresentation, in that he falsely represented to the defendant that the note was in payment for the shares

of the stock of the State Discount Company; that Bloch further represented that the State Discount Company was solvent and that "the stock was worth the money;" that Bloch knew that the State Discount Company was insolvent; that Bloch "falsely and fraudulently" promised the defendant that the note "would not be delivered to or received by any one until after its maturity;" that Bloch induced Saule to endorse the note so that it would appear that the latter was an innocent purchaser for value, before maturity, but that Saule never had the note in his possession, paid no consideration for it, and acted merely as a figurehead for Bloch and the State Discount Company; that subsequent to the execution of the note, Bloch became the president of the plaintiff and acted as its "essential representative" in receiving and discounting the note and that, therefore, the plaintiff had notice of the insolvency of the State Discount Company and "knew that the stock could not be delivered to the defendant," and that the plaintiff received the note, with notice that Saule was not an innocent purchaser for value, that the State Discount Company was insolvent and that the note was executed without the defendant receiving any consideration for its execution.

Upon the trial of the case, the plaintiff put the note in evidence and rested.

Bloch was the first witness to take the stand in behalf of the defendant. He testified, over objection, that the stock was never delivered to the defendant. He further

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testified that he was president of the State Discount Company and also of the plaintiff bank when the note was discounted by Saule; that, in the month of November, 1927 he resigned as president of the plaintiff and went into the hotel business; that he "gave" the note to Saule, placed his "O. K." on it, and told Thielen, an assistant cashier of the plaintiff, to take care of Saule as he, Bloch, had "O.K'd" the note. So far as the abstract discloses, he was not interrogated about his knowledge of the financial condition of the State Discount Company, or about any agreement with the defendant that the note should not be negotiated before maturity.

Charles G. Wolf testified that for the last twenty years he had been president of the Citizens State Bank of Melrose Park, and also an officer of the State Discount Company; that, without referring to the books, he had no present recollection of the exact amount of the assets of the State Discount Company in May, 1927, and that the books were in his possession. He was permitted to testify, over objection, that, in May, 1927, the actual cash value of the Company's assets did not exceed \$100,000.00 and that its liabilities "ran in the neighborhood of \$175,000.00." He also stated that he had been acting as trustee for the stockholders in an endeavor to raise sufficient money to pay all the debts of the company and that, up to the time he testified, he had succeeded in paying all the obligations of the company, except \$25,000.00.

The defendant testified that he was a physician, residing in Melrose Park and had attended Bloch's family professionally; that Bloch told him that he had a few shares

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...residing in ... and ...
...professionally; ... that he had a ...

left in the State Discount Company which were valuable and were "about two to one," and that Bloch said that he would hold the note at his office "until such time as I was ready to take it up." Over objection, he further testified that the stock was never delivered to him. In this connection he said that Bloch promised to deliver the stock in a few days, that he, the defendant, asked for the stock several times. But he gave no dates. He was not asked about his knowledge of the financial condition of the State Discount Company.

Lester M. Thielen was called as a witness in rebuttal. He testified that in 1927 he was the assistant cashier for the plaintiff; that the first time he saw the note in question was on a Saturday night in the month of May 1927; that it was presented by Saule, who was accompanied by Phil Gartner, who was known by the witness to be a stockholder, director and officer of the plaintiff bank and also an officer of the State Discount Company; that Gartner asked the witness to approve of a loan to Saule, stating that he knew Saule very well and that the loan was good; that Bloch was not in the bank at that time, and that, according to his recollection, Bloch's "O.K." was placed on the note about a week after the note had been discounted. Saule received from the plaintiff the amount of the note, less the discount charges.

Evidently the trial court believed the testimony presented by the defendant. The question then arises whether this evidence fairly tended to support any of the defenses

left in the state "absent" on which were written and
were "about two to one," and that "about two to one" was
held / the note at his office "until such time as I was
ready to take it up." Over objection, he further testified
that the stock was never delivered to him. In this con-
nection he said that Black promised to deliver the stock in
a few days, and he, the defendant, asked for the stock
several times, but he gave no date. He was not asked
about his knowledge of the financial condition of the state
financial company.

Witness A. Thibault was called as a witness in
rebuttal. He testified that in 1937 he was the president
of the company, and that the first time he saw
the note in question was on a Thursday night in the month
of May 1937; that it was presented by Black, who was
accompanied by Bill Carter, who was known by the witness
to be a stockholder, director and officer of the defendant
bank and also an officer of the state financial company;
that Carter asked the witness to approve of a loan to
Black, stating that he knew Black very well and that the
loan was good; that Black was not in the bank at that
time, but later, according to his recollection, Black's name
was placed on the note about a week after the note had been
discounted. Black testified from the witness stand about
of the note, that the financial company
testimony the trial court believed and accordingly
presented by the defendant. The question then arose whether
this evidence being sought to support any of the charges

interposed. The principal defenses were failure of consideration and that the note was fraudulently placed in circulation.

As to the issue of failure of consideration, the facts are undisputed that the stock was to be delivered immediately, or within a few days after the execution of the note, and that the defendant was not to be required to pay the note until he was ready so to do. We consider that the real understanding of the parties was that the note was not to be negotiated before maturity, or at least until the stock was delivered. The stock was never delivered and proof of that fact was competent under the issues. The defendant was therefore not obligated upon the note to the president of the plaintiff bank. If the plaintiff had knowledge of the facts surrounding the transaction, it was not a bona fide holder of the note. We think that the facts warrant a finding that it did have such knowledge.

Bloch was the president of the plaintiff at the time the note was discounted. According to his testimony it was discounted upon the strength of his O. K. which was placed upon the note. In authorizing the discounting of the note he was acting as the sole agent and representative of the plaintiff.

We are not unmindful of the often referred to rule that a corporation is not chargeable with notice where its agent receives information, which because of his own private interest, he presumably will not communicate to his principal. But there are several decisions of this court holding that the

interposed. The witness did not want to discuss the
circumstances and that the case was primarily a case in
circumstances.

As to the issue of liability of the defendant, the
facts are undisputed that the stock was to be delivered
immediately, or within a few days after the execution of
the note, and that the defendant was not to be required
to pay the note until he was ready to do so. He contended
that the real understanding of the parties was that the
note was not to be negotiated before maturity, or at least
until the stock was delivered. The stock was never delivered
and proof of that fact was presented under the issue. The
defendant was therefore not obligated upon the note to the
extent of the plaintiff's claim. If the plaintiff had
knowledge of the facts surrounding the transaction, it was
not a bona fide holder of the note. He knew that the
note was not a binding one and it did not have such knowledge.

Block was the president of the plaintiff at the time
the note was issued. In order to get testimony it was
discovered upon the strength of his testimony that he
upon the note. In authorizing the discounting of the note
he was acting as the agent and representative of the
plaintiff.

It was not contended by the other parties to the
case that a corporation is not liable for its notes when the
agent receives instructions, which he uses in his own private
interest, as presumably will not constitute to his principal.
The state has several decisions of this court holding that the

rule does not apply where the agent receives his information while acting as the sole or essential representative of the corporation in the transaction. Mutual Investment Company v. Wildman, 188 Ill. App. 137 and Sherman State Bank v. Smith, 244 Ill. App. 171.

In Mutual Investment Co. v. Wildman, supra, the court said:

"In the Higgins case, supra, (Higgins v. Lansingh, 154 Ill. 301), at page 387, our Supreme Court quotes with approval from the case of Barnes v. Trenton Gas Co. 27 N. J. Eq. 33, in which quotation there is, first, a statement of the general rule, viz: 'that notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from, or is at the time connected with, the subject matter of his agency,' and, second, a statement of an exception to the general rule, viz: that where the agent is an officer of a corporation, and is dealing with the corporation in his own interest and opposed to the interest of the corporation, he is held not to represent the corporation in the transaction, so as to charge it with the knowledge he possesses, which he does not communicate to the corporation and which the corporation does not otherwise possess. * * * * *

There are several well considered cases which recognize a qualification to said exception to the general rule, viz: where the officer of the corporation (though he also acts in his own interest or the interest of another corporation) is the sole or an essential representative of the corporation in the transaction in question, in which event his knowledge is held to be imputable to the corporation. See Brobston v. Penniman, 97 Ga. 527; Morris v. George Loan Co., 109 Ga. 12; Black Hills Nat. Bank v. Kellogg, 4 S. D. 312; Steam Stonecutter Co. v. Myers, 64 Mo. App. 527; Traders Nat. Bank of Ft. Worth v. Smith, (Tex. Civ. App.) 22 S. W. Rep. 1056; Kiblack v. Gosler, 74 Fed. Rep. 1000. In 2 Pomeroy's Eq. Jur. (3d. Ed.) sec. 675, note 1, the author expresses a doubt whether said exception to the general rule can apply to 'presidents, and other such managing officers of a corporation, through whom alone the corporation can act.' In an exhaustive note, following the report of the case of Waynesville Nat. Bank v. Irons, 8 Fed. Rep. 1, at page 11, it is stated that 'in order to charge the corporation with notice of facts of which a director or other officer had knowledge, he must have acted in the transaction on behalf of the corporation.' Several cases are there cited in support of the statement, in which cases the officer of the corporation acted in its behalf in the transaction and his knowledge was held to be imputable to the corporation. See Bank of U. S. v. Davis, 2 Hill (N. Y.) 451; First Nat. Bank of New Milford v. Town of New Milford, 36 Conn. 93; Clerke's Sav. Bank v. Thomas, 2 Mo. App. 367; National Security Bank v. Cushman, 121 Mass. 490."

As to the other issue, the defendant testified that Bloch agreed not to negotiate the note but would hold it until the defendant was ready to take it up. If this be true the note was negotiated in breach of faith or under such circumstances as amounted to a fraud, within the meaning of Section 55 of the Negotiable Instrument Act, and the burden was placed upon the plaintiff to show that it was a holder in due course. Bell v. McDonald, 308 Ill. 329 and Foncannon v. Lewis, 327 Ill. 455. In the latter case the Supreme Court of this State said:

"By section 55 of the act every holder is deemed prima facie to be a holder in due course, but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he, or some person under whom he claims, acquired the title as a holder in due course."

The title of Bloch to the note in question was defective and the trial court was warranted in finding that the plaintiff failed to show that it was a holder in due course.

The judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

WILSON, P. J. AND HOLDOM, J. CONCUR.

as to the other issues, the defendant testified
that although he did not know the name of the woman
with whom he had a relationship, he was ready to take it up.
It is true that the name was suggested in evidence of John
or rather was suggested in evidence of John, which
the meaning of Section 23 of the Evidence Act is that
it is not necessary to show the identity of the
person, and the burden was placed upon the plaintiff to show
that it was a matter in the course of Ball v. Ball,
305 Ill. 528 and Foran v. Foran, 327 Ill. 482. In
the latter case the Supreme Court of this State said:

"By Section 23 of the Evidence Act it is provided
that in order to prove a matter, it is not necessary
to show the identity of the person and the relationship
between the parties, but the burden is on the
plaintiff to prove that he, or some other person, was
the person with whom the defendant had a relationship."

The state of mind as to the name in question was
detractive and the trial court was justified in finding that
the plaintiff failed to show that it was a matter in the

course.
The judgment of the Illinois Court of Civil Appeals is
affirmed.
JUDGMENT AFFIRMED.

WILLIAM J. BRYAN, J. CLERK.

33552

EVA BASSUOT,

Appellee,

v.

H. F. De LONGE,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

256 I.A. 605⁵

Opinion filed March 5, 1930

MR. JUSTICE RYNER delivered the opinion of the court.

The plaintiff, a woman seventy-two years of age at the time of the accident, which resulted in injuries to her person, recovered a judgment in the Superior Court of Cook County, against the defendant, for \$650.00. The judgment was based upon the verdict of a jury. This is the appeal of the defendant.

The plaintiff was the only witness, testifying in her behalf, as to how the accident occurred. She testified that prior to the accident, she had been employed for a period of five and one-half years at a salary of twelve dollars per week; that she usually walked to her place of employment, which was a mile and one-half distant from her home; that her custom was to proceed from the rear of the house, the second story of which she occupied, to the alley back of the premises; that in so doing, she passed along the north side of an old barn which was used as a garage; that at 6:30 o'clock of the morning of November 10, 1927, she, pursuant to her custom, passed along the side of the barn until she reached the alley and then turned to the south, when the door of the garage "came all of a sudden and knocked" her down so that she fell on her side and back; that it was light when she entered the alley and that she could see that the door of the garage was not



EXHIBIT

EXHIBIT

2561.01.005

Opinion filed March 2, 1930

MR. JUSTICE WATSON delivered the opinion of the court.

The plaintiff, a woman twenty-two years of age at

the time of the accident, was residing in injuries to her

person, recovered a judgment in the Circuit Court of this

county, against the defendant, for \$100.00. The judgment was

based upon the verdict of a jury. This is the subject of the

decedent.

The plaintiff was the only witness testifying in her

behalf, as to the accident occurred. She testified that

prior to the accident, she had been employed for a period of

five and one-half years as a salary of twelve dollars per week;

that she usually worked for her place of employment, which was

a mile and one-half distant from her home; that her mother was

to proceed from the rear of the house, and second story of

which she occupied, to the alley area of the property, that

in so doing, she passed along the north side of an old barn

which was used as a garage; that at this point of the morning

of November 10, 1927, when, pursuant to her custom, walking

along the side of the barn which was toward the alley and

then turned to the north, when the door of the garage house

all of a sudden and without her having seen the fall in her

side and back; that at this point when she entered the alley

and that she should see that the door of the garage was not

open as she started southward in the alley and that, after the door struck her, she was wedged in the space "between the back of the door and the barn."

The alley in question was dedicated to the use of the public and the rear end of the barn or garage was approximately even with its edge. The defendant leased the building and used it for the storage of cars used in his business.

An employee of the defendant testified that the accident occurred about twenty minutes before seven, in the morning, at which time it was dark; that he opened the door of the garage and, in so doing "got a full view of the alley;" that he then went back into the garage and while inside he heard someone "holler" and that he went around the door and found the plaintiff back of it, with her hat off.

The brief of the defendant contains no points suggesting for our consideration the rulings of the trial court in the admission or exclusion of evidence, or in instructing the jury.

It is particularly urged as a ground for reversal of the judgment of the trial court that the testimony of the plaintiff was contradicted by that of five unimpeached witnesses for the defense. The substance of the testimony of these witnesses was that the building, in question, had sagged so that the bottom of the door, when it was opened for a distance of about a foot, rested upon the cobble stones or granite blocks, with which the alley was paved, and could not be opened further without lifting it so that it would clear the pavement. It is contended that this evidence contradicted the testimony of the plaintiff that the door opened suddenly. The point is

open as she started southeast in the alley and that, after the door struck her, she was carried in the same direction the back of the door and the wall.

The way in question was located to the rear of the building and the rear end of the door or door frame was located inside, even with its edge. The defendant's hand was touching and used it for the purpose of pulling the door open.

An employee of the defendant testified that the accident occurred about twenty minutes before seven, in the morning, at which time it was dark; that he opened the door of the building and, in so doing, got a full view of the alley; that he then went back into the building and while inside he heard someone "hollo" and that he went toward the door and found the plaintiff back of it, with her back to it.

The trial of the defendant consisted of no other evidence and for our consideration the trial court is the admission or exclusion of evidence, or in introducing the jury.

It is particularly noted as a ground for reversal of the judgment of the trial court that the testimony of the plaintiff was contradicted by that of three independent witnesses for the defense. The substance of the testimony of these witnesses was that the building, in question, had a sign on the front of the door, when it was opened for a distance of about a foot, rested upon the whole frame of the door, and after which the alley was closed, and could not be opened further without lifting it so that it would clear the pavement. It is contended that this evidence contradicted the testimony of the plaintiff that the door opened normally. The point is

without merit. The jury was warranted in finding that the door opened suddenly despite the obstruction. The obstruction did not prevent the defendant's employee from lifting the door and swinging it back with velocity and force sufficient to knock the plaintiff down.

It is further urged that evidence of the financial condition of the plaintiff had a prejudicial effect upon the jury. The physician, who attended the plaintiff, testified that he called at her home three times within about five days and that, later, he treated her at his office about nine days after the accident and that "she felt that she could not afford"- At this point an objection was interposed and sustained. The plaintiff testified that the doctor called to see her three times in one week. She also said, "I later went to his office, at his orders, because I was unable to pay -" Again objection was made and sustained. The rule that evidence of the financial worth of litigants where not directly in issue, is improper, is well recognized, yet in the instant case we do not consider such evidence sufficient ground for reversal. No objection was made to the testimony of the plaintiff that she was seventy-two years of age, that prior to the accident she was employed at a wage of twelve dollars per week, and that, after the accident, she earned five dollars per week. This evidence was sufficient to apprise the jury of the fact that the plaintiff could not afford the expense of the continuous attendance of a physician.

It appears that the plaintiff sobbed when she was on the witness stand. But the trial judge expressed himself as being satisfied that she was not feigning and immediately

alcohol bottle. The jury was instructed to find that the
fact of having been in the neighborhood of the accident
did not prevent the defendant's employer from finding the
beer and bringing it back to the defendant's residence
to check the plaintiff's claim.

It is further stated that evidence of the defendant's
condition of the plaintiff had a material effect upon the
jury. The physician, who attended the plaintiff, testified
that he called at her home three times during the five days
and that, except, he testified that at his office about nine days
after the accident and that he was told that she could not afford
to pay for her condition was improved and sustained. The
physician testified that the doctor called on her two days
later in one week. The jury said, "I never went to his office,
at his bedside, because I was afraid to go." This objection
was made and sustained. The jury took evidence at the time-

cial party of witnesses where not directly in issue, is
however, is well recognized, that in the instant case we do
not consider such evidence sufficient ground for reversal.
In objection was made to the testimony of the plaintiff that
she was twenty-two years of age, that prior to the accident
she was employed at a store of various articles not sold, and that,
after the accident, she began to sell these articles. This
evidence was admitted to sustain the fact that the
plaintiff could not afford the expense of the defendant's
attendance of a physician.

It appears that the plaintiff began when she was in
the witness stand, and the jury judge expressed himself as
being satisfied that she was not feigning and immediately

excused the jury. He then admonished counsel for the plaintiff to warn her to control herself. She was again put on the witness stand and it does not appear that she made any further demonstration.

Whether she was expressing a natural emotion or whether she was feigning was a matter for the determination of the trial judge.

It is also contended that the plaintiff was guilty of contributory negligence and that there was no evidence of negligence on the part of the defendant. These issues were determined in favor of the plaintiff by the jury and their verdict was not against the manifest weight of the evidence.

The judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. AND HOLDOM, J. CONCUR.

exposed the jury. He then explained counsel for the plaintiff
left to warn her to watch herself. She was again told by
the witness about it and it does not appear that she made any
further observation.

Whether she was expressing a natural reaction or
whether she was telling was a matter for the determination
of the trial judge.

It is also contended that the plaintiff was guilty
of contributory negligence and that there was no evidence of
negligence on the part of the defendant. These issues were
determined in favor of the plaintiff by the jury and their
verdict was not against the manifest weight of the evidence.
The judgment of the superior court of Cook County
is affirmed.

JUDGMENT AFFIRMED.

WILLIAM J. ANDERSON, J. CLERK.

62
33253

BENJAMIN R. KOBAY,
Plaintiff in Error,

v.

UNITED NATIONAL CLOTHIERS,
a corporation, et al.,
Defendants in Error.

7
ERROR TO SUPERIOR COURT,
COOK COUNTY.

256 I.A. 606

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This writ seeks the review of a decree dismissing the original bill of complaint and the bill as amended for want of equity. After issues were taken, reference was had to a master in chancery for his conclusions of law and fact. The objections and exceptions thereto were respectively overruled. The master's report was approved and confirmed, and in accordance with its recommendation the original bill and the bill as amended were dismissed.

It appearing on the hearing before the court that the bills were multifarious the chancellor of his own motion, sue sponte, so declared them in an order of court. Thereupon complainant elected to proceed with the cause on the questions of an accounting and breach of contract.

The contract referred to was between the corporation and complainant. The bill, however, made as additional defendants the officers and stockholders of the corporation and sought to hold them individually and jointly liable with the corporation. By it complainant not only sought to recover damages for breach of his said contract with the defendant corporation and an accounting growing out of such contractual relations, but also sought to

WILLIAM M. KERRY,
Respondent in Error.

v.

UNITED STATES OF AMERICA,
Appellant in Error.

WILLIAM M. KERRY vs. UNITED STATES OF AMERICA.

This will review the view of a learned friend of the
original bill of complaint and the bill as amended for want of
evidence. The former was taken, however, and has been a matter
in controversy for his conclusions of law and fact. The objection
and exceptions thereto were respectively overruled. The majority
report was approved and confirmed, and in an opinion with the
recommendation the original bill and the bill as amended were
dismissed.

It appeared on the hearing before the court that the
bill was amended and the bill as amended of his own motion, and
thereby, to be heard there in an order of court. The court
plaintiff effect to proceed with the cause on the assumption of
an accounting and order of account.

The court's finding is not before the court for
and compliance. The bill, however, was an additional finding
into the affairs and proceedings of the corporation and sought
to have them reviewed and finally decide with the corporation.
It is complained that the court should have recovered the same.

of his bill contained with the finding of the court and the accounting
reviewing one of these commercial relations, but also sought to

hold the stockholders liable for the unpaid portion of their stock. There was no claim that the corporation was insolvent. It is clear that the bill was multifarious. When so, the court to avoid embarrassment in the trial of the case, can, suo sponte, enforce that objection to the bill. (Gilmore v. Sapp, 100 Ill. 297, 302.) The result of complainant's election after that order was to eliminate from the consideration of the court with complainant's consent all other matters than those pertinent to an accounting with the corporation alone, and to ^{the} charge that it had breached its contract. Therefore complainant is in no position to argue that the bill was not obnoxious to the objection of multifariousness. The case, therefore, need be considered only with reference to those two issues on which it was finally submitted for hearing.

The record is voluminous, covering about 1200 pages and containing 44 exhibits offered on each side. It is impracticable and unnecessary to set forth the bill or review the evidence in detail, if after careful examination we cannot say that the findings of the master with respect to the matters thus left for consideration by complainant's election, are against the weight of the evidence. It has been frequently said that where the findings and conclusions of the master have been confirmed by the chancellor, and it does not appear in the record that such conclusions are manifestly against the weight of the evidence, the decree should not be disturbed by the reviewing court. (Siegel v. Andrews & Co., 131 Ill. 350; Champion v. McCarthy, 228 id. 87; Day v. Wright, 233 id. 218; Kiekamp v. Kiekamp, 275 id. 98.)

Briefly summarized the salient facts are:

Defendant corporation is a co-operative organization composed of retail clothiers having as its main object the pooling of the purchasing power of its stockholders. July 27, 1914,

With the exception of the fact that the original position of the parties was not changed, the court has decided in favor of the plaintiff.

That the bill was amended, and that the court has decided in favor of the plaintiff, is the result of the court's decision.

The court has decided in favor of the plaintiff, and the bill was amended.

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complainant entered into a contract with defendant corporation to secure members or stockholders in it. That contract was subsequently rescinded and all matters growing out of it adjusted by entering into another contract between the parties February 4, 1916. The latter contract is the one in question. It expressly provides that all claims up to and including its date held by either party against the other were mutually cancelled. Much that is relied upon by complainant to show non-compliance of defendant corporation with the latter contract consists of matters that were then adjusted. In the course of complainant's employment under previous contracts involving claims and counter-claims and other matters of controversy that were then, as the latter contract states and the master finds, mutually compromised and adjusted, and an accord and satisfaction was then had. It included the cancellation and surrender of a note of complainant for \$5,000 held by the corporation, and, as clearly inferable, also a prior allowance of \$10,000 to him for previous services, to which he makes reference in his brief, insisting that he is at least entitled to that sum as damages. It is clear that each of these obligations was released and relinquished in consideration of each party entering into said contract of February 4, 1916, and the question of damages need not be considered if defendant corporation did not breach the contract.

By its terms he was to devote his time principally to securing new members for the corporation and was to undertake no other work or business incompatible with his duties under the contract. He was also, beginning June 1, 1916, to secure not less than 100 members for the defendant corporation, at the rate of 25 members quarterly, during the first year of said contract. He was, however, privileged to enter upon his work from the date of his contract and the memberships taken prior to June 1, 1916, were to be counted as

[illegible]

taken in the first year of the contract. Up to October 24, 1916, he had secured only 19 new members for the corporation. To support his claim that he did secure the requisite number he includes memberships secured in the previous November and December. It is clear that under the contract of February 4, 1916, he was privileged to include in the first quarter only memberships secured after February 4, and that complainant breached his contract in this respect as well as in the other respects for which it was subsequently cancelled, as found by the master.

The contract was declared cancelled at a regular meeting of the board of directors at which complainant was present and voted, (1) because he did not devote his entire time principally to the securing of new members; (2) because he did undertake and performed other work incompatible with his said duties and obligations under said contract, and (3) because he procured only 19 new members during the first eight and one-half months of the life of the contract. All of the directors except complainant voted for the resolution of cancellation.

With respect to the first two grounds it appears that in the month of May, 1916, complainant advertised for a partner to help organize a chain of clothing stores, and, as admitted by him, he went in the following July or August to New York to promote the enterprise and did operate elsewhere in New York in furtherance of the project. We think the master was justified in finding that this business was incompatible with his duties under the contract in question and was in violation of its terms, and also in finding that he was not devoting the necessary time for the procurement of the increase of memberships or stockholders of the corporation as required by the terms of his contract, and that he failed to secure the requisite number for the first quarter, and abandoned his con-

taken in the first part of the interview. Up to October 22, 1935, he had secured only 15 new members for the organization. To secure his claim that he had secured the remainder of the membership, he stated that the membership was in the previous November and December. It is clear that under the terms of the contract of January 1, 1935, he was not allowed to receive in the first quarter more than 15 new members after which he was to continue to receive his quota of 15 new members. As well as in the other quarters for which it was anticipated, he testified, he found by the matter.

The contract was designed to operate as a regular meeting of the board of directors in which employees were present and voted. (1) Because he did not receive his entire quota principally to the securing of new members; (2) because he did undertake and performed other work in connection with his said duties and obligations under said contract; and (3) because he received only 15 new members during the first eight and one-half months of the life of the contract. All of the above facts and circumstances were for the purpose of establishing.

His report in the first 8 months of the contract is that in the month of May, 1935, employees received as a present a help organizing a union of clothing makers, and he testified that he went in the following July to work in the factory to promote the enterprise and his specific duties in New York in connection of the project. He stated that he was located in the month of this business was transacted with his sales agent the amount in connection with the situation of the union, and also in the fact that he was not visiting the members of the organization as the importance of membership or attendance of the organization as required by the terms of his contract, and that he failed to receive the requisite number for the first quarter, and obtained the same

tract. Complainant admitted that he stopped procuring memberships after July 15, 1916, and that after that time he sought to carry out his said plan of chain stores. We think there was ample evidence that he breached the contract in these several respects.

But complainant claims that there were prior breaches by defendant corporation, enumerated as (1) a failure to pay him moneys that were owing to him; (2) failure to give him assignments of memberships as provided for in the contract, and (3) collecting money on memberships that was not paid over to him, and appropriating and denying him credit for a membership of a party in the State of Minnesota.

Complainant's argument on these claims is not very illuminating. He refers mainly to certain exhibits which do not of themselves, or when taken with all the other evidence bearing on these claims, establish affirmatively a breach of contract by defendant, or that what he claims as breaches took place prior to his own. We do not find that there was any request on defendant or refusal by it to pay complainant money that was actually owing to him or to comply with provisions relating to the assignment of memberships to him. In fact the items of money referred to apparently include claims or obligations that were adjusted by the contract of February 4 aforesaid.

Regarding the alleged failure to make assignments and denying credit for the Minnesota membership, he refers to two letters addressed to defendant as not replied to, written on May 22 and June 3. The former refers to a membership received from Minnesota in the previous February as not reported to him. It does not definitely appear when any such membership was received. If prior to February 4, it was received under his prior contract, all claims under which were expressly adjusted by the contract of

Complaints admitted that he stopped producing membership lists after July 12, 1936, and that after that time he sought to keep out his own plan on certain dates. He stated that he sought to keep out of the business of the contract in these several respects:

That complaint claims that there were prior transactions by defendant corporation, represented as (1) a failure to pay him money that were owing to him; (2) failure to give him membership or certificates as provided for in the contract; and (3) collecting money on memberships that was not paid over to him and appropriating and using him credit for a membership of a party in the state of Minnesota.

Complaint's statement in these claims is not very illuminating. He refers mainly to certain activities which he has of himself, or when taken with it the other evidence bearing on these claims, establish affirmatively a breach of contract by defendant, or that what he claims as defendant took place prior to his own. He does not state that there was any recovery on defendant or referred by it to pay complaint money that was actually owing to him or to simply with provisions relating to the advancement of memberships to him. In fact the claim of money referred to appears if it is claimed as defendant that were rejected by the contract of February 4, 1936.

Regarding the alleged failure to make memberships and referring credit for the Minnesota membership, he refers to the letters referred to defendant as not being referred to by the contract and that it was found that a membership received from Minnesota in the previous February is not reported to him. It does not definitely appear when the membership was received. It prior to February 4, it was received under his prior contract. All claims under which were expressly rejected by the contract of

that date. His own letter indicates that there was a dispute as to whether he was entitled to the same, and there is nothing in this record on which its merits could be determined. In a letter of June 3 he states that a license is necessary to do business in certain States before subscriptions are solicited, under the blue laws of those States, and that he is sending blank applications for licenses to be filled out. It is testified by two of defendant's officers that they were unable to comply with the requirements for such applications. There is nothing in the record to show they could have complied with the blue laws of the several States or to show affirmatively that they breached the contract with reference to those or any other matters. These letters were, however, answered on July 15, by the then president of the company. From the letter it appears that a conference with complainant had been held in the presence of two other directors in which these matters were thoroughly discussed, and that it was then clearly stated that they had nothing to do with regard to the membership work and the blue laws in the different states, but that the membership work was absolutely in his charge; that they had in every way co-operated with him so far as consistent with the interests of the organization, but that they had no evidence of his doing his part for the past several months; that he had been in Chicago most of the time using the company's office and the conveniences of the corporation for his own private purposes and personal matters. The record is bare of sufficient proof to controvert these contentions.

Complainant does not appear to have done anything under the contract after that date (July 15, 1916) and the evidence tends to support indifferent attention to his duties prior to that time. The parties had evidently reached points of difference as to their respective claims and obligations, and do not appear to have met again until the following October when, after discussion and an

unavailing attempt to get an amicable disposition of the contract, the board of directors of defendant company cancelled the same as aforesaid because of his said violations and abandonment of the same. We do not think complainant's contention of a breach of contract by defendant is supported by sufficient evidence, or that the evidence shows that the breaches relied upon by him occurred prior to his first breach.

As to the claim for an accounting, all the items with respect thereto appear to relate to transactions under a prior agreement that were adjusted as aforesaid, by the contract in question of February 4. Hence we need not enter into details.

So far, therefore, as the master's findings relate to the two subjects on which the cause was submitted for hearing we think from the evidence pertinent thereto that the court properly approved the report and dismissed the bill for want of equity. At any rate, in the confused state of the record, we cannot say the evidence preponderates the other way.

AFFIRMED.

Seanlan and Gridley, JJ., concur.

unavailable attempt to get an adequate disposition of the con-
tract, the board of directors of the company was called
the name as a general business of the company and
agreement of the same. It is not within the company's com-
petence of a person of contract by the board is supported by
efficient evidence, or that the evidence shows that the person
relied upon by him occurred prior to his first breach.
As to the 11 in for a contract, all the items with
respect thereto appear to relate to transactions under a prior
agreement that were entered into by the contract in
question of February 4. Hence we need not enter into details.
On the other hand, as the witness's findings relate to
the two subjects on which the same was submitted for hearing
we think from the witness testimony that the same
properly approved the report and submitted the bill for sale of
equity. In any case, in the summary state of the record, we
cannot say the witness misrepresented the other way.

WITNESSES:

John and William, Jr., counsel.

33726

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MARY REINHOLD, administratrix,
etc.,
Defendant in Error,
v.
MARIA K. HALLOREN,
Plaintiff in Error.

7

ERROR TO SUPERIOR
COURT, COOK COUNTY.

256 I.A. 606²

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The judgment under review was rendered against defendant for \$4,500 in an action to recover compensation for the death of plaintiff's decedent.

At the close of plaintiff's case defendant asked for an instructed verdict. The motion was denied, and defendant resting, the case was submitted to the jury without further evidence. The usual motions were also denied.

Decedent had been a tenant of defendant for nine years occupying an apartment in her building on the east side of South Halsted street. The apartment was on the third floor. It could be entered by a stairway from the front entrance or by an open stairway at the rear of the building. The first story of the building extended beyond the main building 25 feet to an alley east of it. The rear stairway led to the roof of the first story and was used in common by the several tenants and those rendering services to them. After reaching the roof one had to walk the 25 feet across it to the main building to enter any of the apartments above the first floor.

The structure containing the stairway at the rear of this first story extended from the wall about 10 feet and was about 7 or

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[Handwritten initials]

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STATE OF NEW YORK, SHERIFF'S OFFICE.

RETURNED TO THE SHERIFF.

W.

STATE OF NEW YORK, SHERIFF'S OFFICE.

RETURNED TO THE SHERIFF.

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IN SENATE, JANUARY 18, 1900.

REPORT OF THE COMMISSIONER OF THE LAND OFFICE.

The following report was presented to the Senate on January 18, 1900.

For the year 1899 the total amount of land sold was \$1,000,000.

The following table shows the results of the sale.

As the result of the sale of the land, the following table shows the results of the sale.

Inspected and sold. The total was \$1,000,000, and the amount of land sold was 100,000 acres.

The sale was successful in the land office, and the results were as follows.

Inspected and sold. The total was \$1,000,000, and the amount of land sold was 100,000 acres.

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Inspected and sold. The total was \$1,000,000, and the amount of land sold was 100,000 acres.

8 feet in width. Entering it from the alley one would go up a half dozen steps toward the building, turn to his right on the landing and go up a similar flight of steps leading east directly away from the building to another landing or platform parallel with the alley and surrounded on its east side and north and south ends by a rail or banister. After reaching it he would turn to the right again toward its south end where a stairway led directly toward the building to the roof of the first story. The entire west side of platform was taken up with the openings and railings to these two stairways.

The evidence disclosed that the railings at the south end of the landing had been in a bad and rotted condition for two years before the accident in question; that it was loose and shaky and one of the tenants had fastened it up in some way by a cord; that another tenant had warned her children about its condition, and that another had complained about it to the agent of the landlord some six months before the accident.

Some time between 9:45 and 11:30 p. m., a dark and rainy night on March 12, 1927, decedent was found unconscious in the alley near the south side of the structure with parts of said south railing alongside of him. He died the next morning. No one appears to have seen him fall but the circumstances clearly indicate that in his descent after reaching the second landing or platform he in some way came in contact with the railing and fell off the platform with it to the concrete pavement about 10 feet below.

On the question of liability defendant in error relies upon the general rule followed in this state that "an implied duty is imposed upon the landlord to keep in repair common passage-ways and approaches retained under his control and used by the several tenants as the means of access to the portions of the premises demised

8 feet in width. According to the map the line was run up a hill
 down steps toward the building, then on the left to the building
 and to up a similar flight of steps leading down toward the
 the building to another building or structure partially seen in the
 and surrounded on the east side and north and south ends by a wall
 or barrier. After reaching it the wall went to the right again
 toward the house and across a driveway and finally toward the
 building on the east of the main house. The entire wall also of
 platform was built up with the same height and width as these two
 stairways.

The evidence disclosed that the walling of the south end
 of the landing was built in a way and with a decision for the
 before the building in question; and it was found that the
 of the building was located in up in the way of a wall that
 toward had worked out within the building, and that the
 and completed about it to the space of the building was six
 before the building.

Some time between 1915 and 1917, or at a date and date
 night on March 12, 1917, defendant was found unconscious in the
 near the south side of the building. The body of the person was
 alongside of him. He also the body was found. He was exposed to
 seen him fall but the circumstances of the fall are not
 against after reaching the ground landing or platform on to some way
 came in contact with the railing and fell and the platform was
 to the concrete pavement about in that way.

On the question of liability, defendant is not liable
 when the general rule followed in this state that no liability
 is imposed upon the landlord as long as the common passage-way
 and defendant retained his control and was in the control
 of the house or house on the premises of the defendant owned

to them, and that the landlord is liable for injuries received by a tenant because of the landlord's negligence in performing this duty." (Burke v. Mullett, 216 Ill. 545, 550.) This rule is sustained by the weight of authority. (Am. & Eng. Ency. of Law, Vol. 18, 2nd Ed., p. 220.) The rule has been applied in various cases coming to this court upon very similar facts, and some of them involved the claim of the landlord's negligence in not repairing a defective railing about a passage-way used by tenants in common where the landlord had notice of the existence of the dangerous condition, or after the defect had continued for such a length of time as to charge him with constructive notice. (Fenno v. Cullen, 162 Ill. App. 283; Rosson v. Goodridge, 135 id. 164; Bodden v. Thomas, 192 id. 348; Petterson v. Gnatek, 205 id. 309.)

No question is, or can be, raised here as to adequate notice to the landlord of the condition of the railing for a long period of time before the accident.

The only point made as to liability by plaintiff in error is that as decedent leased from year to year he must have known of the defect in the stairway at the time of letting and must be deemed to have accepted it in the condition he found it, together with all incidental risks and hazards, unless there was a contract to repair. In other words, plaintiff in error invokes the rule of caveat emptor applied in the case of known defects in premises leased exclusively by a tenant. There can be no doubt about the application of that rule where the defective condition is a part or parcel of the demised premises as distinguished from that portion of the premises retained under the control of the landlord for the common use of his tenants. In other words, the rule is applicable to the premises in the exclusive possession of a tenant. The cases cited by plaintiff in error from this State are of the latter character. Authorities are cited from

to show that the defendant is liable for injuries sustained by
a servant because of the defendant's negligence in performing his
duty. Boyd v. Smith, 111 Ill. 342, 350. (1894). This rule is estab-
lished by the weight of authority. (See 1 Ann. Cas. 101, 102, Vol.
12, and 2d, p. 101.) The rule has been applied in various cases
coming to this court upon very slight facts, and some of them involved
the claim of the defendant's negligence in not providing a defective
railing about a passageway used by females in common with the
landlord and others of the existence of the defective condition, as
~~they had before and continued for such a length of time as to charge~~
him with constructive notice. (Boyd v. Smith, 111 Ill. 342, 350.)
Boyd v. Smith, 111 Ill. 342, 350. (Boyd v. Smith, 111 Ill. 342, 350.)
Boyd v. Smith, 111 Ill. 342, 350. (Boyd v. Smith, 111 Ill. 342, 350.)
No question is on our part, raised here as to defendant's liability
to the landlord of the condition of the railing for a long period of
time before the accident.
The only point made as to liability by plaintiff is that
that no defendant learned from year to year or had have known of the
defect in the railing at the time of the accident and could be charged as
have respect to in the condition as found in 1894, together with all in-
cidental risks and dangers, which should have been removed or repaired.
In other words, plaintiff is trying to charge the defendant with
applied in the case of known defects in premises located exclusively
by a tenant. There can be no doubt about the application of such rule
where the defective condition is a part of the fabric of the building
itself or is otherwise fixed upon the premises of the defendant, and
under the control of the landlord for the purpose of his tenants.
In other words, the rule is applicable in the premises in the exclusive
possession of a tenant. The issue cited by plaintiff in other cases
this case and of the last plaintiff.

other jurisdictions, mostly from the State of Massachusetts, to the effect that the duty of the landlord in respect to a passage-way used in common is that of only due care to keep it in such condition as it was or purported to be at the time of letting. (See C. J. 130, and cases cited in marginal reference 10.) The rule in this State is not so qualified. Numerous authorities in harmony with those of this State are referred to in notes in 14 L. R. A., p. 239; 23 L. R. A., p. 156; 48 L. R. A., (N.S.) 920, and L. R. A. 1916, D. p. 1226.

Under the rule we think there can be no doubt of defendant's liability for negligence in failing to remedy the defect unless decedent was guilty of contributory negligence.

But "where reasonable men acting within the limits prescribed by law might reach different conclusions, or different inferences could reasonably be drawn from the admitted or established facts, the question of contributory negligence is for the jury." (Bueller v. Phelps, 252 Ill. 630, 634.)

It can not be deemed negligence that decedent chose to enter his apartment by the rear instead of the front stairway, or that he undertook to use it on a dark, rainy night unless he had knowledge of its condition. There was no direct proof that he did know of it. His widow testified that he had gone up by the rear stairway "some seven or eight times in the evening in the last year or so." She also testified that she had seen him going up the stairway and being left-handed he "would use his left hand going up stairways to support himself." She knew of its condition but testified that she had never spoken of it to him. While it is somewhat difficult to understand why she should not have done so and why, if other tenants knew of its condition for so long a time, he should have remained ignorant of it, yet the question of contributory negligence was one of fact properly submitted to the jury. There was evidence tending to show that he was a

man who ordinarily exercised care and had used the back stairway only occasionally and in the evening. For aught that appears to the contrary he knew nothing of the condition of the railing and may without negligence have fallen against it or have taken hold of it for support in ignorance of its condition. While upon the evidence the question of contributory negligence may be debatable we can not say that the finding of the jury was manifestly against the weight of the evidence.

We do not think, therefore, that the court erred in refusing to direct a verdict for defendant. Nor did it err in excluding testimony offered by her in the nature of an opinion as to the danger of ascending the staircase. Such evidence would have trenchanted upon the province of the jury.

The judgment accordingly is affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

and the evidence presented on the back of the
only possibility, and in the evidence. The evidence
the contrary to the position of the witness and
my witness negligence have failed to show that
it is the subject in the evidence. While upon the
evidence the question of negligence will be decided
we will say that the finding of the jury was manifestly against
the weight of the evidence.

It is not true, therefore, that the jury acted in the
finding as stated in the evidence. For all it is in the
finding, the jury acted in the interest of an opinion as to
the degree of negligence and the evidence. The evidence would have
been taken from the evidence of the jury.

The finding accordingly is affirmed.

1922.

English and Givens, J., concur.

33759

64a

7

GEORGE D. CONNER and
WILLIAM J. O'CONNOR,
copartners,

Appellants,

v.

D. W. PROPST, M. D.,

Appellee.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

2581A. 606³

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order entered in a proceeding in the nature of a writ of coram nobis, vacating a judgment entered against defendant as in case of default for failure to file an affidavit of merits as provided in section 55 of the Practice Act.

The petition on which the order was entered alleges that judgment was obtained March 12, 1929, as a default matter, without serving defendant or his attorney with any notice, and that the cause was not on the trial call at the time, and that defendant had no notice of the judgment until served with a copy of execution April 9, 1929, and that his attorney entered his appearance in the case June 16, 1928.

The petition was supported by the affidavit of his attorney which states more specifically the grounds of the proceeding. In it he states that he entered the appearance of defendant as his attorney of record June 16, 1928; that no declaration was then on file; that being about to leave the State for a period of over two weeks and knowing that it would be necessary to file a defense he called plaintiff's attorney by telephone with regard to the situation and was told by him that he would take no advantage of affiant whatsoever and that he might file any kind

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U. S. DEPARTMENT OF JUSTICE

Appellate

D. F. GALT, Jr.
Appellant

ALLIANCE FOR THE AMERICAN WAY

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U. S. DEPARTMENT OF JUSTICE

This is an appeal from an order entered in a proceeding in the nature of a writ of habeas corpus, involving a judgment entered against defendant on the basis of evidence not before the court. The petition on which the order was entered states that judgment was obtained March 12, 1957, on a judgment entered against defendant on the basis of evidence not before the court, and that the same was not on the trial roll at the time, and that defendant had no notice of the judgment until served with a copy of execution April 7, 1957, and that his attorney entered his appearance in the case June 10, 1957.

The petition was answered by the plaintiff at his attorney which states that specifically the grounds of the proceeding. It is his prayer that he entered the appearance of defendant as his attorney of record June 10, 1957, that no declaration was made on this date being about to have the same set a period of over two weeks and knowing that it would be necessary to file a defense he called plaintiff's attorney to defendant with regard to the situation and was told by him that he would have no advantage or benefit whatsoever and that he signed the same kind

of a defense later on, whenever it was convenient; that not knowing the nature of the declaration he informed plaintiff's attorney that he would leave a plea with someone in his office to be filed before July 1; that it was then said that neither of them would take any advantage because of any pleadings filed, or to be filed, by the other, but each would keep the other advised of the progress of the case; that relying on such agreement he left Chicago and was gone for a period of from two to three weeks; that in his absence his plea aforesaid was filed; that he took no further steps in the matter with respect to the pleadings except to inform his client it would be necessary to get together and prepare a set-off or counter claim; that he heard nothing from opposing counsel and "carefully watched the progress of the case upon the call of the calendar, planning to get the case at issue in ample time for its trial;" that after learning from his client of the service of the execution, he, for the first time, "learned from the files that plaintiff had filed an affidavit of claim and that a judgment by default had been entered as aforesaid;" that he had never been informed of the filing of an affidavit of claim along with plaintiff's declaration; that plaintiff's attorney had "for over nine months neglected to demand of affiant to file an affidavit of merits or proper pleas," and that without notice to him, opposing counsel had moved for a default and judgment, in direct contravention of the agreement existing between them.

The contention in the affidavit is that there was acquiescence in the waiving of the affidavit of merits, and that the violation of the agreement was a fraud upon him and his client.

It is apparent that the mistake or error of fact, that must be relied upon under section 89 of the statute, rests in this case upon an alleged violation of an arrangement or understanding between counsel for notice of any future procedure in the case by

1. The first step in the process of identifying a problem is to define the problem. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the underlying causes. Once the causes have been identified, the next step is to develop a plan of action. This involves identifying the steps that need to be taken to solve the problem and determining the resources that will be needed to implement the plan. Once a plan of action has been developed, the final step is to implement the plan. This involves carrying out the steps that have been identified in the plan and monitoring the progress of the implementation.

THE UNITED STATES DEPARTMENT OF THE INTERIOR

After the war, the United States was able to provide aid to the people of China.

THESE ARE THE RESULTS OF THE INVESTIGATION INTO THE MATTER OF THE
 A. L. B. COMPANY AND ITS ASSOCIATES. THE RESULTS OF THE INVESTIGATION
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WASHINGTON, D.C. 20250

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It should be noted that the above information is not to be used for any purpose other than the one for which it was provided.

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and information as to whether or not the subject is a member of the

plaintiff. Such a state of facts may disclose misplaced confidence or a breach of verbal agreement between counsel in the case but not what is recognized as an error of fact under section 89 of the Practice Act.

The errors of fact that may be corrected upon a writ of coram nobis at common law, for which section 89 now substitutes a motion in the nature thereof, are fully discussed in Marabia v. Thompson Hospital, 309 Ill. 147. It is apparent that what is relied upon in the case at bar as an error of fact does not come within the scope of common law on the subject as there stated, or under the decisions of the courts so far as our attention had been directed to them.

The petition, without a sufficient statement of facts, assumes defendant was entitled to notice of taking judgment by default, and the affidavit is based solely on the violation of an agreement or understanding between counsel as to giving notice before taking it. As a matter of legal procedure plaintiff was not required under section 55 of the Practice Act, or under the rule of the court respecting notices, to give notice before the court could properly enter judgment under said section. The statute and the rule were so interpreted in Cramer v. Commercial Men's Association, 260 Ill. 516.

Nor was the court bound to take cognizance of private agreements between counsel. During the term it might in its discretion, as provided in section 58, have set aside the default and judgment because of such understanding. But after the term it was jurisdictional that the ground for vacating the judgment be such as comes within the accepted construction of what constitutes error of fact, or comes within the purview of the statute. We think it is

beyond question that a mere breach of courtesy or of an understanding between counsel cannot be so interpreted. To hold otherwise would not only be a clear departure from all precedents with which we are familiar, but would open wide the door to disturb judgments entered at prior terms and deprive them of their wonted stability.

But even if the ground relied upon to support the motion could be held to come within the purview of the statute there could be no question of the negligence of defendant's attorney, by whose conduct he would be bound, in his waiting for plaintiff's attorney to take action with reference to his own failure to file proper pleadings and an affidavit of merits. It was his duty to act, and negligence not to. His own affidavit shows that he waited for several terms of court to pass without taking any steps to attend to the pleadings in his case. Even the trial court recognized his lack of diligence in that respect, but thought the want of courtesy by plaintiff's attorney justified the order. We have found no authority that admits of such construction of the statute or of the law with respect to a proceeding coram nobis. Any exercise of reasonable care and attention on the part of the attorney for defendant within the nine months that intervened before the default and judgment were taken would have saved his client from a judgment as in case of default. As said in the Cramer case, supra: "The motion is not intended to relieve a party from the consequences of his own negligence;" and as was said in the Marabia case, supra: "This case is one where defendant, having been served with process, with full knowledge of a defense permitted judgment to be rendered by default."

Accordingly the order is reversed.

Scanlan and Gridley, JJ., concur.

REVERSED.

33768

65a

7

NOAH CROSS,
Plaintiff in Error,

v.

THE CUMEO PRESS, Inc.,
a corporation,
Defendant in Error.

REC'D TO SUPERIOR COURT,
COOK COUNTY.

256 I.A. 606⁴

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

By this writ plaintiff seeks the reversal of a judgment against him in a personal injury suit. The declaration charged that defendant, through its employe, did negligently operate its motor vehicle whereby plaintiff was suddenly struck, knocked down and run over by it and seriously injured. There was also a count for wilful and wanton negligence. Defendant pleaded the general issue and that at the time of the occurrence plaintiff was working under and was bound by the terms of the Workmen's Compensation Act, and that the injury, accident and occurrence arose out of and in the course of the employment of the plaintiff as an employe of an employer which was also bound by the terms of said Act, and that defendant and all of its agents and employes were also at the time working under and bound by the terms of said Act, and that, therefore, plaintiff had no right of action against the defendant.

No question arises but that the evidence sustained the special plea to the extent of showing that at the time of the accident plaintiff and his employer, the Chicago Surface Lines, and defendant and its employes were working under and bound by said Act. It was a question of fact, however, for the jury to determine from the evidence, as we held when the case came here before on an instructed verdict for defendant, whether or not the act being

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33768

WILLIAM G. ...
Defendant in error

v.

THE ...
Plaintiff in error

IN THE ...
COURT

2561A 608

W. ...
Plaintiff in error

By this will plaintiff seeks the reversal of a judgment against him in a personal injury suit. The declaration charges that defendant, through its employee, the negligently operated its motor vehicle which plaintiff was lawfully driving, struck and ran over it and seriously injured it. There was also a claim for actual and mental damages. Defendant pleaded the general issue and that at the time of the occurrence plaintiff was working under and was bonded by the terms of the defendant's Corporation Act and that the injury, accident and occurrence arose out of and in the course of the employment of the plaintiff as an employee of an employer which was also bound by the terms of said Act, and that defendant and all of its agents and employees were also at the time working under and bound by the terms of said Act, and that, therefore, plaintiff had no right of action against the defendant. No question arises as to the evidence submitted in support of the extent of showing that at the time of the accident plaintiff and his employer, the Chicago ... and defendant and its employee were working under and bound by said Act. It was a question of fact, however, for the jury to determine from the evidence, as we said when the case came before us on instructions verified for defendant, whether or not the act being

performed at the time of receiving the injury was one coming within the scope of plaintiff's employment. (251 Ill. 560.) On that question the jury to a special interrogatory answered, "Yes." To another special interrogatory whether the defendant wilfully and wantonly caused the injury the answer was, "No." But the general verdict of "not guilty" necessarily included a finding that defendant was not negligent as charged in the several counts of the declaration.

It is argued that the verdict and the special finding that plaintiff was injured while in the course of his employment are against the weight of the evidence. While we are disposed to think that the special finding is against the greater weight of the evidence, and that under the circumstances and facts in evidence plaintiff was not working within the scope of his employment when he received the injury, yet that fact becomes utterly immaterial if, as found by the jury, defendant was not guilty of negligence. On that issue we are not prepared to say that the verdict was manifestly against the weight of the evidence.

Plaintiff was helping to push an automobile westward across a bridge at the time he received the injury. Three others were pushing it, one on each side of the car, and one with plaintiff at the rear. While they were so pushing the car defendant's truck came up slowly from behind and run in and upon plaintiff's left leg, causing the injury complained of.

The driveway on the north half of the bridge is about 18 feet wide. Street car tracks are on its south side. The driver of defendant's truck, which was 6 feet wide, testified that at the time of the accident his truck was within 5 inches of the south edge of the driveway and about the same distance inside the north street car rail, and there was about 4 feet between it and the side of the automobile; that when he got up within 4 feet of the automobile plaintiff gave him the signal to pass by and that when he was within about 3 feet

of plaintiff, going about 3 miles an hour, plaintiff slipped on some ice and fell so that his left leg "shot right out across the street car track" when there was about 2 feet distance between the truck and the rear end of the automobile; that he stepped on the brake and the car stopped right on his leg. There was no evidence to the contrary as to where the truck was at the time of the accident, and the evidence was quite uniform, including plaintiff's own testimony, that the automobile was from 3 to 4 feet north of the north rail of the street car track. While plaintiff denied that he slipped and that there was ice on the bridge, one of his witnesses, the one pushing the car at his side, testified that there was snow on the ground and that plaintiff "was slipping and the car was going away from him, and he was going lower all the time;" that the wheel of the truck was less than a foot from his leg at the time, and that the truck was going very slow. Another witness for plaintiff testified that his foot slipped and he then fell down and the truck ran up on his leg. None of the other witnesses saw just how the accident happened. Their heads were down as they pushed the car. Their attention was not directed to it until they heard plaintiff's cry.

In view of the foregoing evidence we cannot say, as we would be required to do to reverse the judgment, that the jury's finding on the issue of defendant's negligence was manifestly against the weight of the evidence.

Unless, therefore, it can be said, as claimed, that there was error in the court's instructions or its rulings we cannot disturb the verdict of the jury.

The principal instruction complained of is defendant's instruction 9:

of himself, which shows a lack of self-control, and a lack of
 some two and a half to three feet. "That is the only way
 which can be done" when they are about a foot distance from the
 truck and the rest of the group. It is not possible to do
 this and the car stopped right in the middle. There was no evi-
 dence to the contrary as to where the truck was at the time of
 the accident, and the evidence was quite consistent in showing plain-
 tiff's own testimony, that the truck was from 2 to 3 feet
 north of the north end of the street at 11:00. While plaintiff
 denied that he stopped the car there was no one on the street, and
 of his testimony, the one showing the car at his side, testified
 that there was none on the ground and that plaintiff "was slipping
 and the car was going away from him, and he was going down all
 the time" that the wheel of the truck was from 2 to 3 feet
 north of the street, and that the truck was going away from
 him at the time, and that the truck was going away from
 another witness for plaintiff testified that the truck stopped and
 he then fell down and was stuck up on his leg. None of the
 other witnesses who had not the slightest interest. Their testi-
 mony down as they pushed the car. Their attention was not directed
 to it until they heard plaintiff's cry.

In view of the testimony evidence of counsel says, as we
 would be required to do by payment of the judgment, that the truck
 standing on the south of plaintiff's testimony was completely un-
 der the weight of the evidence.
 Unless, therefore, it can be said, as counsel says, that
 the error in the court's instructions on the truck was material and
 that the verdict was unjust.

The principal instruction complained of is as follows:

Instruction 21

"You are instructed that the Workmen's Compensation Act provides among other things that the said act shall apply automatically and without election to all employers and all their employees engaged in any department of an enterprise or business of carriage by land, water or aerial service and loading or unloading in connection therewith, including the distribution of any commodity by horse drawn or motor driven vehicle where the employer employs more than three employees in the enterprise or business, except" etc.

Defendant's instruction No. 3 told the jury that:

"You are instructed that an injury arises out of and in the course of the employment of an employee provided the origin or cause of the accident belongs to and is connected with his contract of service, is incidental to performing the contract of service, and is suffered in the course of the doing of something which the employee may reasonably do within the time during which he is employed and at a place where he may reasonably be during that time to do that thing."

Defendant's instruction No. 5 directed a verdict for defendant if the jury found from the evidence that the injury complained of "arose out of and in the course of the plaintiff's employment by the Chicago Surface Lines."

There can be no question but that each of these instructions correctly stated the law. But it is urged by plaintiff in error that they gave to the jury an entirely erroneous view of the law applicable to the facts of the case; that the act does not necessarily apply "automatically" because the "two employers" were engaged generally in businesses covered by its provisions. Instruction No. 9 is practically in the language of the statute with respect to the automatic application of the act to the kind of businesses in which plaintiff's employer and defendant were engaged, and defendant was as much entitled to an instruction applicable to its theory of the case that plaintiff came within the provisions of the Act, as was plaintiff to an instruction given in his behalf based on his theory of the evidence that "where an employee engages in a voluntary act at a place where his employment does not reasonably carry him and where he incurs a danger of his own choosing and one altogether outside of any reasonable exercise of his employment and his duties as such employee

"You are instructed in the company's compensation of provided money under which the law and shall apply automatically and without exception to all employees and if their employees engaged in any department of an enterprise or business engaged by fact, duty or contract service and holding or making in connection with the business including the distribution of any company or other person or other person vehicle under the employer's control and that there is no exception in the enterprise or business, etc."

Relevant's instruction No. 5 and the jury found

that the instruction was an attempt to make out of the course of the employment of an employee provided the origin of the instruction was to make it automatic with his conduct of duties, is intended to be binding the employer of service, and is not to be binding on the duty of something which the employer may be bound to do within the law, being with it a proper part of a duty which he may reasonably be bound to do at that time."

Relevant's instruction No. 5 directed a verdict for the

defendant it the jury found the evidence that the injury complained of "arose out of and in the course of the plaintiff's employment by the defendant." The "message" instruction stated that there can be no recovery for an injury which is not caused by the defendant's negligence. The jury gave to the jury an instruction which was a view of the law applicable to the facts of the case and the jury found necessarily apply "actionable" because the "two employees" were engaged essentially in business covered by the provisions. Instruction No. 9 is essentially in the language of the statute with respect to the automatic application of the act to the kind of business in which plaintiff's employer and defendant were engaged, and defendant was bound to follow an instruction applicable to the theory of the case that plaintiff came within the provisions of the act, as was plaintiff to an instruction given in his behalf based on the theory of the case. Hence the "there an employee engaged in a voluntary act in a place where his employment does not reasonably cover him and where he is not a danger of his own conduct and one who is not outside of any reasonable exercise of his employment and his duties as such employee

and is thereby injured, such injury does not arise out of and in the course of his employment." We do not think, as contended by plaintiff, that the instructions aforesaid given at defendant's request were calculated to make the jury believe that plaintiff was working under said act and injured while in the course of his employment. Under the undisputed evidence and the statute the businesses of defendant and plaintiff's employer were of the kind that automatically brought them and him within the provisions of the Act, and instruction No. 9 did nothing more than so state. Under the special plea and the evidence presenting an issue of fact thereon, whether plaintiff was working at the time of the accident within the scope of his employment, defendant was entitled to these instructions. They did not exclude the hypothesis of plaintiff's theory but still left the question of fact for the jury to determine whether the injury complained of was received while in the course of his employment. When all the instructions were taken together, as they should have been, the jury could not well have been misled or confused as to the issues and the law pertaining thereto.

To be sure, as urged by plaintiff, the burden of proof was on defendant to prove its special plea that plaintiff was acting within the scope of his employment when injured, but no instructions appear to have been given as to where the burden of proof lay on that subject. Plaintiff would have been entitled to such an instruction if he had asked for it. He cannot complain, therefore, that none was given. (City of Chicago v. Keffe, 114 Ill. 222, 230.) However, as before stated, while we think the evidence on that subject preponderated in plaintiff's favor, it is unavailing if nevertheless defendant was not, as found by the verdict, guilty of negligence.

The gist of plaintiff's action is negligence on the part of defendant and without establishing it he cannot recover. On that issue the verdict was against him, and being unable to say it is

manifestly against the weight of the evidence or that there was reversible error in the rulings of the court we cannot disturb the verdict and the judgment on that ground. "If a defendant pleads, and proves one plea in bar, he is entitled to judgment." (McClure v. Williams, 65 Ill. 390, 392.)

Other instructions are complained of. One of them was to the effect that the mere happening of an accident in and of itself raises no presumption of negligence on the part of defendant, nor is it evidence in and of itself of the exercise of due care on the part of plaintiff. This is not a case of res ipsa loquitur, nor a case between a common carrier and a passenger, and as said ⁱⁿ Barnes v. Danville Street Ry. Co., 235 Ill. 566, "the presumption arises, however, from the nature of the accident and the circumstances and not from the mere fact of the accident itself."

It is also urged that an instruction directing the verdict for defendant, if the jury believed from the evidence that plaintiff failed to use that degree of care and caution as an ordinarily prudent and careful person would use, etc., was erroneous, in view of the count charging wanton and wilful negligence. In view of the fact, however, that the jury found specially that the defendant was not guilty of wilfulness the jury could hardly have been misled by the instruction. It related particularly to the other counts, and instructions were given by plaintiff (No. 1 and No. 5) directing a verdict for him if the jury found among other things from the evidence that the defendant "failed to use ordinary care," etc. thus limiting its application to the other counts than the one charging wilfulness. Taking the instructions together the jury could hardly place a wrong interpretation on defendant's instruction with respect to the necessity of the use of ordinary care on the part of plaintiff and defendant. There was no evidence of ill-will of defendant's driver, and in fact no evidence on which to base the count of wilfulness. We do not think the

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instructions so complained of constitute reversible error.

In a prior suit brought by plaintiff's employer against defendant on the theory of its liability to pay back to said employer what it had paid plaintiff under the theory of its obligation so to do under the Workmen's Compensation Act, defendant pleaded the very opposite to what it pleaded here with respect to plaintiff's employment coming within the provisions of the act. For that reason plaintiff urges that defendant was estopped from now taking a contrary and inconsistent position. The contention is untenable, this action not being between the same parties.

Finding no reversible error the judgment is affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

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is material, that action was taken between the two parties.

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R. I. DAVIS and
CHARLES A. KOPEKE,
as trustee,
Appellees,

v.

CHARLES SEEMAN et al.,
Appellants.

7

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

256 I.A. 607

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal by Louis W. Mack, one of the defendants in a foreclosure suit, from an order entered July 2, 1929, directing him as a tenant of the property involved, to pay rent in the amount of \$875.00 instantly to the receiver who had been appointed on May 3, 1927, to take possession of the property and collect the rents therefrom. A previous order, entered August 12, 1927, required him to pay the receiver rent at the rate of \$125.00 a month.

The appeal has been erroneously denominated as interlocutory. The order appealed from is not such as is contemplated under our statute pertaining to interlocutory appeals. While the previous order was final with respect to appellant's obligation to pay rent to the receiver, the order appealed from must be regarded as final with respect to the amount alleged to have become due under the previous order. While the proceeding evidently contemplated a contempt order, the one entered was merely one to pay a specific amount as rent.

Both the issues raised and the points discussed at the hearing presented much impertinent and irrelevant matter as the basis of an attack upon the appointment of the receiver. Among

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U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C. 20535
JAN 10 1967

MEMORANDUM FOR THE DIRECTOR
SUBJECT: THE CASE OF THE COURT

This is an appeal by Louis J. Bock, one of the defendants in a fraudulent sale, from an order entered July 1, 1967, directing him as a tenant of the property involved, to pay rent in the amount of \$1,000.00 monthly to the receiver who has been appointed on May 1, 1967, to take possession of the property and collect the rents therefrom. A previous order, entered August 11, 1967, required him to pay the receiver rent at the rate of \$1,000.00 a month.

The appeal has been previously communicated to the receiver. The order appealed from is not such as to be unconstitutional under an estate pertaining to involuntary receivership. While the previous order was final and would be appealable, it is not such as to be unconstitutional, nor does it require him to pay rent in the amount of \$1,000.00 a month. It is the receiver's obligation to collect the rents and to pay them to the court with respect to the amount alleged to have been due under the previous order. While the receiver is not such as to be unconstitutional, the order appealed from is not such as to be unconstitutional.

With the facts stated and the points discussed above, the receiver is requested to take the necessary steps to collect the rents and to pay them to the court with respect to the amount alleged to have been due under the previous order.

the grounds were want of jurisdiction of the court and the nullity of the order of appointment. But this could not be done collaterally. A similar collateral attack on like grounds was made in the case of Vandalia v. St. Louis, Vandalia & Terre Haute R. R. Co. et al., 209 Ill. 73, where the court said:

"Whenever the court has jurisdiction of the subject matter and of the necessary parties its appointment of a receiver cannot be questioned in a collateral proceeding, whether erroneous or not. (Richards v. People, 21 Ill. 581.) However erroneous such an order may be, it is binding not only on the parties, but everywhere, until reversed by superior authority."

There can be no doubt that the court here had jurisdiction of the parties and the subject matter, both of which were recognized in appellant's pleadings; and under the facts pleaded a case was also presented under which the appointment of a receiver was authorized by law. The proper way to raise these questions was on appeal from the order of appointment. No such appeal was taken.

It is not only apparent, therefore, that appellant cannot question the appointment of the receiver by this collateral attack but that the only question that can be raised under his appeal is whether or not the sum of \$675.00 was the balance due for rent. As to that, there seems to have been no dispute. The record discloses no attempt to meet the merits of the only pertinent question of fact that arose on the rule entered upon appellant, but merely an attempt to use the occasion for such collateral attack.

The argument here is a mere continuation of that attack, and while the main ground relied upon, namely, that the petition for the appointment was unverified, has been removed by a corrected record, it is unnecessary to review or discuss the various grounds of an attack that cannot legally be made.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

the grounds were want of jurisdiction in the court and the validity of the order of appointment. But this could not be done collaterally. A similar collateral attack on the grounds was made in the case of Washburn v. St. Louis, Mo. & N. W. Ry. Co., 111. 301.

111. 75, where the court said:

"However the court was jurisdiction of the subject matter and of the parties parties its appointment of a receiver cannot be questioned in a collateral proceeding, whether it be an appeal or not. Washburn v. St. Louis, Mo. & N. W. Ry. Co., 111. 301. However erroneous such an order may be, it is binding not only on the parties, but everywhere, until reversed by superior authority."

There can be no doubt that the court here had jurisdiction of the parties and the subject matter, both of which were recognized in appellant's pleading; and under the facts presented a case was also presented under which the appointment of a receiver was authorized by law. The proper way to raise this question was on appeal from the order of appointment. It was not to be raised.

It is not only apparent, but stated, that appellant cannot question the appointment of the receiver by this collateral attack but that the only question that can be raised under this appeal is whether or not the sum of \$875.00 was the balance due for rent. As to this, there seems to have been no dispute. The record discloses no attempt to move the parties or the court to appoint a receiver. This arose on the issue of the appointment of the receiver and attempt to use the occasion for such collateral attack.

The argument here is a mere repetition of the attack.

All while the main ground relied upon, namely, that the petition for the appointment was unauthorized, has been removed by a corrected record, it is unnecessary to review or discuss the various grounds of attack that cannot legally be made.

33791

MAURICE L. WILLARD,
Appellee,

v.

JOHN J. KERN & COMPANY,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

256 I.A. 607²

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The appeal herein is taken by John J. Kern, "doing business in the name of John J. Kern & Company," from a judgment nominally against said company in favor of plaintiff for \$627.27 and costs.

The court struck his affidavit of merits from the files. He elected to stand by the same. This appeal followed.

The sole question is whether said affidavit stated a defense.

The statement of claim charged that said company was employed to manage and care for a certain building owned by plaintiff and to collect rents from plaintiff's tenants therein; that at the termination of such agency defendant owed said sum, and still owes the sum, after numerous requests to pay the same.

The amended affidavit of merits was filed by Kern in his own name alleging that he was the agent of plaintiff and doing business under the name of said company; that he collected the rents but that plaintiff owed him \$1,200 "for real estate brokerage fees arising out of a contract between him and plaintiff, whereby he produced a purchaser of said building, who was ready, willing and able to buy the same at fixed terms; that he had performed on

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1. The first part of the document is a list of names and dates, which appears to be a record of some kind. The names are written in a cursive script, and the dates are in a more formal, printed style. The list is organized into two columns, with names on the left and dates on the right.

[Faint handwritten notes]

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The above information is being furnished to you for your information and is not to be used for any other purpose.

The following is a list of the names of the persons who have been appointed to the various positions in the various departments of the Government of the State of New York, for the year 1900.

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE

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his part and on account of which plaintiff became indebted to him in the sum of \$1,200 for brokerage fees," and the pleading offered to set-off against the same the alleged indebtedness to plaintiff. He also pleaded that plaintiff has brought an action for the amount "upon the same cause of action" against a surety company in the same court (without otherwise describing it); that his alleged set-off had been assigned to said surety company "as security" and that the same is pleaded by said surety company in said action brought against it.

The pleading then states that he sought and was not permitted to intervene in the suit against the surety company "pursuant to section 4, ch. 132, Cahill's Stats. (1927)." The pleading then proceeds to state argumentatively that said Kern is deprived of his rights under said Section 4, and that plaintiff in bringing said suit against such surety company is estopped from suing in this action.

The averment that the suit against the surety company is the same cause of action herein brought is a mere conclusion. Appellant admits in his assignment of errors that the action against the surety company was on its bond, and therefore a different cause of action. But if it were the same cause of action, we cannot consider in this case alleged errors in that.

It is apparent, too, that a contract for brokerage fees must in its very nature be an entirely different contract from one for the collection of rents. It thus appears that the claim of set-off does not grow out of the contract or cause of action sued upon. And if it does not it is not a proper subject of set-off unless the damages are liquidated. (De Forrest v. Oder, 42 Ill. 500; Clause v. Bullock Printing Press Co., 118 Ill. 612.) Merely alleging that plaintiff is "indebted for" or that "the amount due" is \$1,200 is insufficient to show that it was a liquidated sum or that it was the agreed brokerage

his part and on account of which liability became attached to him in the sum of \$1,000 for property taxes, and the plaintiff advised to voluntarily satisfy the same the alleged indebtedness to plaintiff. He also pleaded that plaintiff was brought on notice for the amount "upon the same cause of action" against a party engaged in the same party (attorney general) and that plaintiff was not bound to have been satisfied to said party company "as attorney" and that the same is pleaded to said party company in said action brought against it.

The plaintiff then stated that he would not be permitted to intervene in the suit against the party company, claiming to be the owner of the said property, and that the plaintiff then proceeds to state affirmatively that with him is verified of his title under said action as the said plaintiff is obliged said with certain such party company is released from suit in this action. The statement that the said action for party company is the same cause of action brought in a party company, appealing matter in the defendant to verify that the action against the party company was by the party and defendant in different cause of action. The is it with the same cause of action as would be considered in this case alleged matter in issue.

It is apparent, that a complaint for a judgment for the sum of \$1,000 for property taxes, and the plaintiff advised to voluntarily satisfy the same the alleged indebtedness to plaintiff. He also pleaded that plaintiff was brought on notice for the amount "upon the same cause of action" against a party engaged in the same party (attorney general) and that plaintiff was not bound to have been satisfied to said party company "as attorney" and that the same is pleaded to said party company in said action brought against it.

fee, if any sum was agreed to.

It has also been held that a claim of set-off for an amount that would come within a first class case cannot be pleaded, as here, in a fourth class case. (Chicago Title & Trust Co. v. Kemler Lumber Co., 151 Ill. App. 579.)

Conceding that every pertinent fact pleaded in the affidavit is true, the defendant has not presented a defense which, under any theory, would entitle him to prevail.

It was irregular, however, to enter a judgment against John J. Kern & Company. The judgment should have been against John J. Kern, the real party in the case, as shown by his own pleading, and may be corrected below from the face of the pleadings.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

Dec. 11, 1941. (See page 10.)

It has since been found that a chain of evidence has been established, showing that certain other persons were connected with the same. (See page 11.)

(See page 12.)

On the 11th of December, 1941, the following was received from the Bureau of Investigation, New York: The Bureau has been advised that the following persons were connected with the same: (See page 13.)

It was further stated, however, that a further investigation of the same had been made, and it was found that the following persons were connected with the same: (See page 14.)

(See page 15.)

On the 11th of December, 1941, the following was received from the Bureau of Investigation, New York: The Bureau has been advised that the following persons were connected with the same: (See page 16.)

33800

DAVID T. ALEXANDER,
Appellee,

v.

MAURICE S. STERN,
Appellant.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

256 I.A. 607³

MR. PRESIDING JUSTICE BARKES
DELIVERED THE OPINION OF THE COURT.

The plaintiff sued to recover \$1,000 as the reasonable value for services rendered by him as an attorney for defendant in a divorce suit brought by the latter's wife. A trial was had without a jury. From a judgment against defendant for \$500 he appeals.

The rendition of the services was not questioned. But defendant denied they were reasonably worth \$1,000, and alleged that a bill of \$400 therefor was submitted and paid, \$50 in December, 1921, and \$350 in January, 1922, and that the statute of limitations had run on the debt. Plaintiff claimed that defendant paid \$25 in the month of May, 1924, which defendant denied.

While each of the pleaded facts, except as to the services rendered, was controverted and the testimony with regard thereto is irreconcilable, yet unless the evidence preponderates in favor of plaintiff's claim of said payment of \$25 in May, 1924, so as to remove the bar of the statute, the suit cannot be maintained.

It appears from the evidence that the services were terminated in December, 1921, and this suit was not brought until in May, 1927. Plaintiff was bound to prove the affirmative allegation of such payment by a preponderance of evidence, else the negative would be presumed. (Bonnell v. Wilder, 67 Ill. 327; Schroeder v.

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The mission of the service was not completed. The following table shows the results of the mission:

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Walsh, 120 Ill. 403.) To take a case out of the statute of limitations the evidence must be clear and satisfactory to overcome the bar of the statute (Wachter v. Albee, 30 Ill. 47), and be of such a character as to clearly show a recognition of the debt, and an intention to pay it. (Carroll v. Forsyth, 69 Ill. 127.)

We have carefully examined the evidence relating to the claim of payment and do not think it was sufficient, in view of testimony to the contrary, to remove the bar of the statute.

Plaintiff was his only witness. Each material fact and circumstance bearing upon the claim of payment to which he testified was flatly denied by defendant. While each party appears to be of equal credibility and unimpeached except by denial of the other, there is no circumstance in the case to corroborate plaintiff's testimony on that subject, but, on the contrary, there were credible, unrefuted circumstances testified to by defendant and his brother tending to show that defendant was not present at the place where, nor at the time when plaintiff claimed the payment was made. Plaintiff contended it was made during the time they were engaged in a poker game; that he was a loser and asked defendant for money to continue the game, saying it was "on account." None of the persons plaintiff said were present in the game was called to corroborate his testimony. The parties were brothers-in-law, were partners for a time, lived in the same apartment building for several years and exchanged visits up to 1926, when litigation between members of the families arose and severed their friendly relations. While the circumstances of the time, place and manner of the alleged payment are not very persuasive of themselves, all the other attending circumstances give preponderance to defendant's side of the controversy and entitle it to more favorable consideration. Plaintiff failing to establish the proof of his allegation by a preponderance of evidence the

Judgment will be reversed with a finding of facts.

REVERSED WITH A FINDING OF FACTS.

(33800)

FINDING OF FACTS.

We find that defendant did not make any payment to plaintiff on account or make a new promise to pay the account sued on at any time within a period of five years from the time the same became due and payable.

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34131

HANNAH BUTLER et al.,
Complainants and Appellees,

v.

FRANK H. T. POTTER et al.,
Defendants,

UNITED STATES MORTGAGE COMPANY
and K. G. NILSEN,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

256 I.A. 607⁴

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order restraining the United States Mortgage Company and its directors from proceeding with a suit pending in the Circuit Court of Cook County against Frank H. T. Potter on two promissory notes for \$5,000 each, executed by said Potter to the Mortgage Company.

The bill is filed by the minority stockholders of the United States Mortgage Company. Omitting allegations therein not necessary to a consideration of the main question, it charges that defendant Potter organized the Automobile Securities Company with a capital stock of \$2500, subscribed for most of the capital stock, and was elected a director thereof; that the charter was amended permitting an increase of stock but no additional capital was paid in; that while he was a director thereof said company borrowed from the United States Mortgage Company in the year 1921, loans amounting to \$29,563.50, which was greatly in excess of its capital; that "in connection with said loans said Potter executed his two promissory notes, payable to himself, and by him endorsed and delivered to said Mortgage Company, for the sum of \$5,000 each, dated April 11 and

HANNAH BROWN to wit:
Complainant and Appellant

v.

FRANK H. T. FOSTER to wit:
Defendant

UNITED STATES DISTRICT COURT
for the District of Columbia
Appellate

Mr. Justice Brandeis
Delivered the Opinion of the Court

This is an appeal from an interlocutory order restraining the United States Mortgage Company and the American Loan Association with a suit pending in the District Court of the District of Columbia. Frank H. T. Foster on two previous occasions in 1907 and 1908, presented by said Foster to the Federal Court.

The bill is filed by the plaintiff stockholders of the United States Mortgage Company. Alleging allegations therein not necessary as a consideration of the main question, it alleges that defendant Foster organized the American Loan Association with a capital stock of \$1000,000, subscribed for two-thirds of the capital stock, and was elected a director thereof; that the company was organized for the purpose of increasing the stock and the business thereof and that while he was a director thereof said company borrowed from the United States Mortgage Company in the year 1901, loan amounting to \$100,000.00, which was granted in violation of the capital stock in connection with said loan said Foster received his fee personally under, payable to himself, and by him endorsed and delivered to said Mortgage Company, for the sum of \$10,000.00, dated April 1, 1901.

April 18, 1921; that the indebtedness of the Securities Company has never been paid, and that it has ceased doing business and been dissolved.

The bill then proceeds to state that "to protect himself from liability on account of the loans so made" by said Mortgage Company to the Securities Company, Potter entered into a conspiracy with appellant Nilsen, and others, to have themselves elected as directors of said Mortgage Company; and pursuant thereto Nilsen was elected a director and president, and Potter a member of the board of directors and that the latter was also appointed attorney for the Mortgage Company and "dominated and controlled the entire board of directors." The bill then charges that a suit has been instituted by the Mortgage Company on the two Potter notes aforesaid, and that it is "a scheme and device" on the part of said Potter to defeat any recovery by the Mortgage Company on said notes or on account of his liability as a director of said corporation.

A demurrer to the bill was overruled, and the Mortgage Company and defendants Nilsen and Barentsen filed an answer denying knowledge as to the organization of the Securities Company or of the amendment of its charter, or of any knowledge by them of anything in the nature of a conspiracy or agreement to defraud the Mortgage Company, or of any false representations by agreement or otherwise to induce stockholders to issue their proxies to Nilsen and Potter to ^{their} secure/election as directors aforesaid, and denied that the suit against Potter was brought to prevent a suit upon Potter's alleged director's liability, and that it was brought to relieve or absolve him from his director's liability or liability on said notes, but alleged that the amount represented by his notes was for money borrowed by him, and that the suit was prosecuted in good faith.

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The theory of the bill evidently is that a judgment in Potter's favor in the suit on the notes would be res adjudicata on the question of his liability as a director of the defunct Securities Company. That theory has no basis in law on the pleaded facts, and if it has none, there is no ground for the injunction appealed from. We are not concerned with the right of appellees to pursue their remedy against the directors of the defunct corporation under the statute. The only question involved here is their right to an injunction to restrain prosecution of the suit against Potter under the circumstances alleged in the bill. We do not think they have that right.

Accordingly the injunctional order is reversed.

REVERSED.

Scanlan and Gridley, JJ., concur.

33538

SAMUEL BAKER,
Complainant and Defendant in Error,

v.

CHICAGO TITLE & TRUST CO., as trustee;
LOUIS COHEN; GREENBAUM SONS BANK &
TRUST CO., as conservator of the
estate of Louis Cohen, insane; HARRY
GREENBAUM; LENA SHERMAN, individually
and as trustee; and others,
Defendants,

WRIT OF ERROR TO

CIRCUIT COURT,

COOK COUNTY.

LOUIS COHEN,

Plaintiff in Error.

256 I.A. 607⁵

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this writ of error, sued out on April 29, 1929,

Louis Cohen, plaintiff in error, seeks to reverse a decree of foreclosure entered by the circuit court of Cook county on June 4, 1927. The decree followed the report and recommendations of a master before whom considerable evidence was introduced. A sale of the premises was made to complainant on July 19, 1927, and the proceeds (\$24,000) realized therefrom have been distributed, as appears from the master's report of sale and distribution, filed September 22, 1927, and contained in an additional transcript of the record filed by leave of this court. The writ of error was not sued out until nearly 23 months after the entry of the decree.

Complainant's bill, filed June 23, 1926, sought a foreclosure of a third trust deed, securing the notes of Louis Cohen and on which more than the sum of \$16,400 was unpaid. This trust deed, dated May 15, 1924, was subject to two prior incumbrances securing the then unpaid balance of about \$61,000. There was also a fourth trust deed for \$2500 and a fifth one for \$475 on the

premises; also several claims for mechanics' liens and several unpaid judgments of record against Cohen.

The master found from the evidence that, at the date of his report (February 1, 1927), there was due to the complainant (Baker) the aggregate sum of \$19,282.89, upon some of Cohen's notes secured by said third trust deed sought to be foreclosed. This aggregate sum included interest, a payment made by complainant on account of a past due indebtedness on one of the prior incumbrances, complainant's allowed solicitor's fees in the sum of \$1500, and the cost of procuring certain minutes for foreclosure.

The master further found that there was due to Harry Greensbaum the sum of \$1580.93, upon other of Cohen's notes secured by said third trust deed. This sum included an additional solicitor's fee of \$150, allowed to him.

The master further found that there was due to Lena Sherman the sum of \$865.77, upon one other of Cohen's notes secured by said third trust deed. This sum included an additional solicitor's fee of \$100, allowed to her.

The master further found that on November 24, 1925, Cohen, being indebted to said Lena Sherman in the sum of \$2500, executed and delivered certain notes aggregating said sum, and to secure the same executed said fourth trust deed, which was recorded on November 27, 1925; that said trust deed provided that, in the event of the failure of Cohen to pay prior incumbrances and interest, Lena Sherman, or the holder of the notes, might pay such incumbrances, etc., and all monies so paid Cohen agreed to repay immediately, and any such advancements should be an additional indebtedness secured by said trust deed; that Lena Sherman is the legal holder of some of the notes, aggregating \$2100, and that there is due to her said sum and accrued interest; that to protect the lien of her said trust deed and avert a foreclosure

she, on November 28, 1925, paid an installment of interest due on the first trust deed, held by the Kasper-American State Bank, amounting to \$1,069.19; that on November 27, 1925, she also paid to the certain owners of prior incumbrances principal and interest due, aggregating \$1110; that, these payments being authorized by her trust deed, she was entitled to recover the same as an additional lien on the premises; that her aggregate lien was subject to certain claims for mechanics' liens of certain defendants and to the lien of complainant's third trust deed; and that there was due to her, subject as aforesaid, the total sum of \$4,758.22.

The master further found that three defendants (naming them) had mechanics' lien claims, aggregating \$784.50 and interest, which were ahead of the lien of such third trust deed sought to be foreclosed; that by virtue of said trust deed the said liens of complainant (\$19,282.59), Harry Greenbaum (\$1580.93) and Lena Sherman (\$565.77) were on a parity and next in order of priority; that next was a claim of one Max Greenfield on a certain judgment against Cohen amounting to \$585.77 and costs; that next was the said claim of Lena Sherman for \$4,758.22; that next was the claim of one Hyman Epstein, amounting to \$3,628.45; and that next were the claims of certain judgment creditors of Cohen.

The decree in question followed the above findings of the master as to the amounts of the several claims (with accrued interest added) and said order of priorities, and ordered a sale of the premises unless within 10 days Cohen, or some of the defendants, made the required payments.

The first and main contention of counsel for Louis Cohen, urging a reversal of the decree, is based upon the claimed mental incapacity of Cohen after October 3, 1924. Counsel argue that after that date all documents and contracts made by him in connection with the premises in question are void. Counsel, however,

state that they make no such objection as to the trust deed sought to be foreclosed, because it was executed several months prior to October 3, 1924. But, as to the notes and fourth trust deed of November 24, 1925, delivered to Lena Sherman, they claim they are void because at that time Cohen's estate was still in the hands of Greenebaum Sons Bank & Trust Co., as conservator, and the conservator had not been discharged as such. The undisputed evidence discloses that on October 2, 1924, Cohen was adjudged insane by the county court of Cook county; that on October 3, 1924, said Bank & Trust Co. was appointed by the probate court conservator of his estate and qualified as such; and that on January 25, 1925, on Cohen's motion and after a hearing, the county court entered an order finding that "Louis Cohen has fully recovered his reason," and adjudging that "he is hereby restored to all the rights and privileges of a sane person." There is, therefore, no merit in counsels' contention. The fact that the present record does not disclose that said Bank & Trust Co. has been discharged by the probate court as conservator of Cohen's estate is immaterial. By said finding and judgment of the county court, on January 25, 1925, he thereafter had full legal capacity to sign papers and documents and manage his personal affairs, - the same as prior to October 2, 1924.

Counsel also contend that the decree should be reversed, (a) because one Meyerowitz, claimed to be a necessary party to the foreclosure proceedings, was not made a party, either as a complainant or as a defendant; (b) because the evidence discloses that the several amounts allowed to Lena Sherman are in some particulars excessive; and (c) because the decree generally is contrary to the law and the evidence. We have considered all of these contentions and the arguments of respective counsel relative thereto, and do not think that there is such substantial merit in any of the contentions as warrants a reversal of the decree. No useful purpose, in our

opinion, will be served by any detailed discussion of the points.

Counsel further contend that, inasmuch as complainant was allowed a solicitor's fee of \$1500, it was reversible error to also allow a solicitor's fee to Harry Greenebaum of \$150, and a solicitor's fee to Lena Sherman of \$100. In the trust deed sought to be foreclosed it is provided that, in case of foreclosure thereof "by said trustee or by the holder or holders of said principal and interest notes or of any of them" in any court, "a reasonable sum shall be allowed for the stenographers' and solicitors' fees of the complainant in such proceeding;" that "in case of any other suit or legal proceeding," wherein the trustee or the holder or holders of said notes shall be made a party or parties, "their costs and expenses and the reasonable fees and charges" of the solicitors of the trustee and said holder or holders, "for services in such suit or proceeding shall be a further lien and charge upon said premises," etc. It is argued that the only allowance which could properly be made in the present case for solicitor's fees would be a reasonable sum for the fees of complainant's solicitor, as there was no other suit or legal proceeding. In support of their contention and argument counsel cite, with other cases, the case of Northern Trust Co. v. Sanford, 303 Ill. 381, 389, where it is said that "provisions for attorney's fees are to be construed strictly, and such fees cannot be recovered for any services unless so provided by the trust deed or mortgage." Under the facts and circumstances disclosed in the present transcript we do not think that the decree should be reversed, and the sale made under it set aside, because of said additional allowances for solicitor's fees, aggregating only \$250, made to Harry Greenebaum and Lena Sherman. Each was a holder of some of the notes which were secured by the trust deed sought to be foreclosed. Complainant was the holder of most of these notes. Harry Greenebaum and Lena

Sherman, employing attorneys other than complainant's attorney, might properly have asked the court to make them additional parties complainant, and if this had been done and if the court had allowed \$1750 for the solicitor's fees for the three complainants the allowance could not have been considered as excessive. We regard the instant contention of counsel as technical and unmeritorious, and one that does not justify a reversal of the decree, or the setting aside of a sale made thereunder on July 19, 1927, and after the proceeds of the sale have long since been distributed. (See Noby v. Chicago Title & Trust Co., 194 Ill. 228, 234.) Furthermore, it does not appear that Cohen's redemption rights, if any he has, were substantially affected by said allowance of \$250 for solicitor's fees. The amount bid at the sale was several thousand dollars less than the amount found due to the various claimants having liens upon the premises.

Recently in this court a motion supported by affidavit was made by complainant to dismiss the present writ of error because of Cohen's failure to file a proper and sufficient bond and for a rule upon him to file an additional bond as security for certain costs. Counter suggestions were filed and the motion was reserved to the hearing. The motion is now denied.

For the reasons indicated the decree of the circuit court of June 4, 1927, is affirmed.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

33675

71a

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

v.

FRANKLIN O. CARTER,

Plaintiff in Error.

ERROR TO MUNICIPAL

COURT OF CHICAGO.

256 I.A. 608

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this writ plaintiff in error seeks to reverse a judgment of the municipal court of Chicago, entered May 25, 1929, wherein he was adjudged "guilty of the criminal offense of violation of the Medical Practice Act, practicing medicine and surgery in the State of Illinois without a license, on said verdict of guilty," and sentenced to the House of Correction in Chicago for a term of six months and to pay a fine of \$200.

The common law record discloses that on April 9, 1929, there was filed in the municipal court the following information, signed and sworn to by A. H. Henderson:

"Andrew H. Henderson, a resident of the City of Chicago in the State aforesaid, comes now here into court, and * * gives the Court to be informed and understand that Franklin O. Carter, heretofore, to-wit, on the 8th day of April, A. D. 1929, at the City of Chicago aforesaid, in violation of Section 24 of the Medical Practice Act as amended, did hold himself out to the public as being engaged in the treatment of ailments of human beings, and did attach the title of physician and the title of surgeon to his name in the sign on the window of his office in Room 300 of the building at 177 N. State St., of the City of Chicago, and at said time the said Franklin O. Carter did not possess in full force and virtue or otherwise any valid license issued by the authority of the State of Illinois to practice the treatment of human ailments in any manner, contrary to the form of the statute," etc.

The common law record further discloses that on May 1, 1929, the State's attorney appeared, as did the defendant in person and by counsel; that leave was given to the People to amend said information on its face; that defendant was duly arraigned and pleaded not guilty;

On the basis of the information received from the above sources, it is recommended that the Bureau be kept advised of any further information received from these sources.

and that after a trial before a jury a verdict was returned on May 17, 1929, finding him "guilty in manner and form as charged in the information herein."

The bill of exceptions discloses that on the trial said A. H. Henderson and four other witnesses testified for the People; that defendant alone testified in his behalf; and that each party introduced certain instruments or writings. During Henderson's testimony he stated that, when on April 9th he signed and swore to the information, it did not contain the words (above italicized) "of the Medical Practice Act as amended;" that those words were interlined in ink immediately after the entry of the order granting leave to amend the information; and that he did not re-swear to the information as so amended.

It has several times been decided in this State that if an information, insufficient as originally filed, is amended so as to render it sufficient, it must be re-sworn to, otherwise it cannot sustain a judgment based upon it. (People v. Elotnicki, 246 Ill. 185, 186; People v. Billerbeck, 323 Ill. 48, 53; People v. Ross, 243 Ill. App. 427, 432-3.) And defendant's counsel here contend that the original information, lacking said words "of the Medical Practice Act as amended," is insufficient to sustain the judgment. In our opinion the contention is without merit. The original information, not having said words, charged in substance that defendant, on April 8, 1929, in Chicago, held himself out to the public as being engaged in the treatment of ailments of human beings and had attached the title of physician and also surgeon to his name in the sign on the window of his office at No. 177 N. State St., Chicago, but that he at the time did not have or possess in force and virtue any valid license, issued by authority of the State, to practice the treatment of human ailments in any manner, contrary to the form of the statute, etc. And there was a statute then in force in the State,

(Cahill's Stat. 1927, p. 1635) making it unlawful or a misdemeanor for any person to do such acts without possessing a proper license under State authority to practice the treatment of human ailments; and hence, we think that such information sufficiently charged an offense, and that it was not essential that the particular section of the statute be stated therein. Furthermore, it does not appear that at any time, either prior to the attempted amendment of the original information or thereafter, defendant made any motion to quash the information, or in any other manner challenged its sufficiency. And, if there be any formal defects in it, it must be deemed that defendant waived them. (People v. Greenberg, 172 Ill. App. 360, 362; People v. Conboy, 178 id. 90, 92; People v. Perca, 181 id. 666, 668.)

While the evidence disclosed that defendant on July 30, 1904, by virtue of the act of 1899, received from the State Board of Health, a certificate or license to practice medicine in this State, it appeared that said certificate or license had been revoked in June, 1926. Defendant's counsel further contend that there was not proper or sufficient proof of the revocation. We cannot agree with the contention. A. H. Henderson, an inspector of the Department of Registration and Education of the State, testified that, when on April 8, 1929, he called on defendant at his Chicago office, he saw that defendant then was engaged in the practice of medicine; that the witness asked him if he then was a licensed physician; and that defendant replied that he was not. The People introduced in evidence a record of said department showing that defendant's said license had been revoked on June 20, 1926. And defendant admitted on cross-examination that he had unsuccessfully attempted by proceedings in certiorari to have rescinded the order of said Department, revoking his said former license. And in this connection the opinion in the case of Carter v. Shelton, 326 Ill. 500, may be

referred to.

And we do not think that the trial court during the examination of defendant made such statements as prejudiced defendant, or such as requires the judgment to be reversed.

Defendant's counsel finally contend that the judgment order is not responsive to the information. There is some merit in the contention. The verdict is that defendant is "guilty in manner and form as charged in the information," and the information charged defendant with certain violations of the provisions of section 24 of the statute. But the language of the judgment order in question would seem to indicate that defendant was guilty of the offense mentioned in section 25 of the statute, rather than section 24. However, as the record does not disclose any error prior to the entry of said judgment it is not necessary, in our opinion, that the cause be remanded for another trial before another jury. We can direct the trial court to enter the judgment that should have been entered, viz, adjudging defendant guilty of the offenses as charged in the information and in accordance with the verdict, - the balance of the judgment as to the sentences to remain the same. (McKulta v. Busch, 134 Ill. 46, 56; Martin v. Barnhardt, 39 id. 9, 14; Storing v. Onley, 44 id. 123, 124; Metzger v. Morley, 184 id. 51, 54.) Accordingly, the judgment will be reversed and the cause remanded to the municipal court with directions to enter the proper judgment against defendant, responsive to the information and in accordance with the verdict.

REVERSED AND REMANDED WITH DIRECTIONS TO
ENTER THE PROPER JUDGMENT AGAINST DEFENDANT.

Barnes, P. J., and Scanlan, J., concur.

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THE UNIVERSITY OF CHICAGO PRESS

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In re Estate of
WILLIAM JOHN KRUSE,
deceased,

HERBERT J. KRUSE,
administrator of said
estate,
Appellant,

v.

JANE THOMLINSON,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

256 I.A. 608²

MR. JUSTICE ORINLEY DELIVERED THE OPINION OF THE COURT.

The common law record in the present cause discloses that the probate court of Cook county, after a hearing on a citation proceeding for the discovery of assets, entered an order on April 17, 1929, finding that neither Jane Thomlinson nor the Austin State Bank had any right, title or interest in any of the property of the deceased, and ordering that the Bank within 20 days deliver and transfer certain money on deposit with it to Herbert J. Kruse, administrator, etc., and further ordering that Jane Thomlinson within the same time turn over and deliver to the administrator certain bank books, papers, deeds, documents, etc.; that from the order Jane Thomlinson perfected an appeal to the circuit court; and that on June 8, 1929, after a hearing de novo and without a jury, the circuit court entered an order or judgment finding that "Jane Thomlinson is entitled in her own right to the amount of \$1721.80 on deposit in a savings account, No. 55,766, in the Austin State Bank in the name of William Kruse" (the deceased), and further finding that she had no right or interest in a certain contract, assigned to William Kruse, for the purchase of certain land in Cook county; and ordering that the bank "turn over to Jane Thomlinson the said amount on deposit

FORRELL, C. H. 1963. *Journal of the Royal Society of Medicine* 56: 101-102.

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THE UNIVERSITY OF CHICAGO

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THE JAMES EARL RAY CASE

with it, which is hereby awarded to her," and that she recover her costs in the proceeding to be paid in due course of administration; but further ordering that she turn over to the administrator the contract for the purchase of the land; and further ordering that, upon the bank's failure to turn over to her said money on deposit, "and interest on the same at the rate of 3% per annum from January 1, 1929," execution issue against the bank, etc.; and further ordering that out of the money on deposit and to be paid to her, "Jane Thomlinson pay the funeral bill and the doctor's bill."

From this order the administrator perfected the present appeal. No cross errors have been assigned.

After the transcript of the record was filed in this court Jane Thomlinson moved (1) that pages 7 to 20 thereof be stricken from the record and (2) that the judgment be affirmed. The motion to strike was allowed but the motion to affirm the judgment was reserved to the hearing.

The clerk's transcript discloses that on June 7, 1929, a certain "agreed statement of facts" was filed in his office (set forth on said pages 7 to 20). There is also a so-called bill of exceptions, certified by the trial judge, in the transcript, but said agreed statement of facts, or other statement showing what evidence was heard upon the trial, is not included therein. The errors assigned by the administrator are based upon the statement of facts. But we cannot consider said statement, it not appearing in the bill of exceptions (Wilson v. McDowell, 68 Ill. 522; Chicago, etc. R. Co. v. Benham, 25 Ill. App. 248; Olson v. Pennsylvania Co., 184 Ill. App. 60); and it must be presumed that sufficient evidence was presented on the hearing to support the judgment.

And, as we find no errors in the common law record, the judgment appealed from should be affirmed, and it is so ordered. Barnes, P. J., and Scanlan, J., concur.

AFFIRMED.

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HOFFMAN BROS. TANNING CO.,
a corporation,

Appellee,

v.

HENRY H. SLINGERLAND,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

256 I.A. 608³

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On October 19, 1927, complainant filed a bill in the superior court of Cook county praying for the specific performance by defendant of a written contract wherein he agreed under specified conditions to purchase of complainant certain improved real estate in Cook county. After answer and replication thereto had been filed there was a hearing before a master, and on May 17, 1928, he filed his report in which, after making numerous findings, he recommended that the court decree specific performance of the contract by defendant, etc. Defendant's objections to the report were ordered to stand as exceptions, and, after a hearing, the court, on April 4, 1929, entered a decree against defendant in substantial accord with the master's findings and recommendations. The present appeal followed.

The contract is dated September 21, 1927, and is on a printed form in common use with the blanks filled in with typewriting, and there are certain special typewritten provisions. It is provided that the purchaser (defendant) agrees to purchase of the Tanning Co. (complainant) the premises (described) at the price of \$72,500, and complainant agrees to sell the same at that price and to convey a good title thereto by general warranty deed, subject to taxes, building and liquor restrictions, etc.; that "the

purchaser has paid \$1,000 as earnest money to be applied on said purchase when consummated, and agrees to pay, within five days after the title is shown to be good or is accepted by him, the further sum of \$19,000, provided a deed as aforesaid shall then be ready for delivery;" that "the balance shall be paid as follows: \$26,000 in one year and \$26,500 in two years from delivery of deed," with interest at 6% per annum, payable semi-annually, "to be evidenced and secured by the purchaser's notes * * and trust deed of even date with said deed on the premises in a form ordinarily used by the Chicago Title & Trust Co.;" and that, "within 15 days from the date hereof, the seller shall deliver to the purchaser (which delivery may be made at the office of A. F. W. Siebel) one of the three following": (1) a complete merchantable abstract of title, showing title of record in the proposed grantor; (2) a guaranty policy of the Chicago Title & Trust Co., in usual form, "guaranteeing purchaser against loss or damage to the extent of the purchase price by reason of defects in or liens upon the title of the proposed grantor in said deed to said premises at the date hereof," subject to certain exceptions; and it is provided that such policy shall be "conclusive evidence of good title subject only to the exceptions therein stated," and that, "temporarily in lieu of such policy, the seller may within the time specified furnish the customary report of said Chicago Title & Trust Co. on the title," in which case the seller "shall not be in default for failure to furnish such policy until 5 days after written demand therefor by the purchaser;" (3) an Owner's Duplicate Certificate of Title issued by the Registrar of Titles of Cook county, Illinois, etc.

It is further provided in the contract inter alia that should the purchaser default in the performance of the contract on his part at the time and in the manner specified, then, at the

seller's option, "the earnest money shall be forfeited as liquidated damages" and the contract become void; that the payment of the price and delivery of the deed shall be made at the office of the Title & Trust Co.; that no tender of the deed, or guarantee policy or report on the title, shall be required, but a notice to the purchaser that the same is ready for delivery shall have all the force and effect of a tender thereof; that the seller agrees to pay a broker's commission of \$2500 to Henry J. Johnson; that "time is of the essence of this contract and of all the conditions thereof;" that said earnest money of \$1,000 shall be held in escrow by said Johnson for the mutual benefit of the parties, and, unless the purchaser shall be entitled to a refund of the earnest money, the same shall be applied, first, to the payment of any expense incurred for the seller by said broker, and, second, to the payment of his commission, - the balance, if any to be paid to the seller. The two special typewritten provisions are as follows:

"The seller will use due diligence to permit the reopening of that portion of the building located on the above described premises, which is now closed by the order of injunction of the District Court, but, pending such vacation of the injunction, the sale shall not be closed, but held in abeyance, and the seller shall not be held liable for any delay caused, without its own fault or neglect, in and about the vacation of such decree."

"At the time of the execution of the warranty deed herein mentioned, seller shall simultaneously deliver such part of the premises herein mentioned to purchaser as may be vacant, and said warranty deed, purchase price and mortgages herein mentioned, paid or executed by purchaser, shall be held in escrow by the Chicago Title & Trust Company until delivery of entire premises to be made to purchaser, and if delivery thereof be not made within 10 days thereafter a reduction of \$15 per day from said purchase price shall be made and paid to purchaser, and interest on the incumbrances then held shall abate from the date of the execution thereof until delivery of entire premises is made to purchaser, such abatement of interest to be made from purchase price held in escrow. If entire delivery is not made on or before the 5th day of November, A. D. 1927, purchaser may by written notice to seller, elect to declare the purchase cancelled, terminated and all documents executed by him and money paid by him shall be returned. This rider controls any conflicting conditions in the contract notwithstanding."

In the decree the court, after setting forth some of the provisions of the contract, made in substance the following findings:

Shortly after September 21, 1927, (date of contract) a messenger of complainant (the seller) delivered to defendant (the purchaser) two papers, being a draft of a petition addressed to the U. S. District Court in Chicago and a draft of a certain bond running to the United States of America. Both papers had been duly executed by complainant, and defendant was requested also to execute them. He, however, told said messenger that such matters would have to be referred to his attorney, L. F. W. Siebel. (From said papers, introduced in evidence, it appears that the same, if also signed by defendant, were to be used by complainant in an endeavor to secure the vacation of a certain injunction, issued by said U. S. Court on January 21, 1927, whereby a portion of the premises in question had been closed for violations of the Volstead Act by former tenants of complainant.)

On September 27th said papers were delivered to Siebel, and on September 28th, there was also delivered a letter addressed to him and signed by Theodore A. Kolb (complainant's solicitor), in which reference was made to the occurrences up to that time. Kolb's letter concluded as follows:

"If the petition and bond which I have submitted to you contain any features which are objectionable to you or to your client, and which can be obviated by making changes and still remain within the scope of the directions laid down by the District Attorney's office, I would be very glad to confer with you and work out any such changes.

I now request of you and your clients, in behalf of Heffmann Brothers Tanning Co. that you execute the documents which I have left with you, containing a petition addressed to the United States District Court, and a bond, or that you state whatever objections you have against signing them. If you object to joining in any petition or bond, it will not be necessary to go into the matter further. If you object to certain features of the petition and bond I will take up the matter of modifying them."

In Siebel's reply, dated September 30th, he stated that his client (defendant) recollected a conversation, had prior to

the signing of the contract, to the effect that defendant would have to sign a bond as a condition to the re-opening of the premises, that defendant then treated the matter "as a joke," but "did not say that he would not sign the petition;" that there are many statements in the petition to which defendant "cannot subscribe" (stating them); and Siebel further stated:

"Now the situation is this: Slingerland is ready, able and willing to comply with the entire contract for the purchase of this real estate as provided by contract signed by both parties, and he will not subscribe to the petition presented to him, and if that is a condition upon which this deal depends, it seems to me that you have thereby voluntarily cancelled the contract, and that we are entitled to the return of the \$1,000.

If you eliminate the bond and the petition, let us proceed under the contract to purchase at once."

Kolb did not thereafter make any further attempt to procure defendant's signature to said petition and bond, but caused to be executed and presented to the U. S. Court a similar petition signed by complainant alone. And on October 5, 1927, by virtue of said last mentioned petition, the U. S. Court entered an order (certified copy in evidence) re-opening all of said premises and vacating the existing injunction, (previously entered on January 21, 1927) and ordering the Marshal of the District "to remove all locks from the premises," and further ordering that

"None of the persons or employees who were in said premises at the time of the violation of the Volstead Act, hereinbefore described, shall be employed upon or located upon said premises."

That it became complainant's duty to deliver to defendant the report on the title to the premises, at Siebel's office, within 15 days from the date of the contract (September 21st); that that time expired with the close of business on October 6, 1927, (one day after the order of the U. S. Court, vacating said injunction, etc., had been entered); that on said October 6th, about 4 o'clock p. m., complainant, by Kolb, caused to be delivered at Siebel's office said report of the Title & Trust Co., also copy of original deed of the premises, executed by complainant, which original deed

The signing of the agreement, it is stated, was a significant step in the development of the country. It was a result of the efforts of the government and the people. The agreement was signed in the presence of the President and the Prime Minister. It was a landmark event in the history of the country. The agreement was signed in the presence of the President and the Prime Minister. It was a landmark event in the history of the country.

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The agreement was signed in the presence of the President and the Prime Minister. It was a landmark event in the history of the country. The agreement was signed in the presence of the President and the Prime Minister. It was a landmark event in the history of the country.

was deposited with the Title & Trust Co. as escrowee, also copy of a letter of direction and deposit addressed to it, also drafts of original notes, coupon notes and trust deed to be signed by defendant, and also other papers, including a letter of that date, addressed to Siebel and signed by Kolb; that in said letter Kolb stated that "all objections to the title have been cleared up" and that a warranty deed to the premises had been delivered to said escrowee, requested the execution of said notes and trust deed, and demanded that within 5 days (by October 11th) there be deposited with said escrowee said notes and trust deed fully executed, and that a payment of \$19,000, less taxes, be made. Kolb's letter concluded as follows:

"If you have any objections to any of the documents which I have prepared, or which I have deposited with the Chicago Title & Trust Co., or if, in your opinion, I have not in every way fully complied with the terms and conditions of the contract, I beg to request you to advise me in writing promptly upon receipt of this letter, so that any alleged deviations or omissions can be remedied, as otherwise we will insist upon a strict performance of the contract.

I beg to advise you also that, immediately upon being advised by the Chicago Title & Trust Co. that you have consummated this sale, you will be let into immediate possession of all that portion of the premises in question except the glove factory."

That on the same day (October 6th) and at about the same hour, certain papers (enumerated in the decree) were delivered by Kolb to said Title & Trust Co., as escrowee; that the papers deposited with defendant by delivery at Siebel's office "were in accordance with the contract; and that the deposits and directions deposited with the Chicago Title & Trust Co. were likewise in conformity with said contract, and that at no time, before or after October 6, 1927, did defendant, by himself or his attorney, make any complaint respecting such deposits, or request any changes, alterations, additions or deductions."

That the contract provided that the report on the title of said premises was "to be conclusive evidence of title;" that

said report "evidenced and certified exactly the title which the complainant had, by said contract, agreed to deliver;" that it "became the duty of defendant to consummate the contract, and to purchase said premises and to deliver cash and notes in payment therefor, in accordance with said contract and the demands by complainant, on or before October 11, 1927;" that the escrowee (the Title & Trust Co.), by letter dated October 7, 1927, advised Siebel of the receipt of said deposits; and that Siebel, acting for defendant, replied by letter, dated October 10th, in part as follows:

"According to the present status of this whole matter, the completion of this contract of purchase is entirely dependent upon my client's signing a petition left at my office to reopen a portion of the premises, mentioned in the contract of purchase, closed under the Prohibition Act, which my client will not sign, as such was not contemplated by our original contract. That being the case we shall not proceed with the contract."

That on October 10th Kolb caused to be delivered to Siebel a letter, advising him that the locks had been ordered removed from the closed portion of the premises, that the Title & Trust Co. had "waived the injunction," and that complainant could give possession of the tannery, which had previously been closed by the injunction order of the U. S. Court," in about two minutes after receipt of the purchase money and mortgage," and demanding that such payment and deposit be made before the close of the day.

That defendant has argued an exception in court to the effect that, inasmuch as the order of the U. S. Court, reopening the tannery, made provision that "none of the persons or employees, who were in said premises at the time of the violation of the Volstead Act, shall be employed upon or located upon said premises," this provision "constituted a limitation upon the use of the premises by defendant, which he had not by his contract agreed to assume;" that the contention and argument are without merit; that the existence of the original injunction order of the U. S. Court is specifically recognized in the contract, wherein it is only required that the

seller (complainant) "will use due diligence to permit the reopening of that portion of the building, located on the described premises, which is now closed by the order of injunction of the District Court;" and that this court (Superior) concludes therefrom that the purchaser (defendant) "was obliged to accept title to said premises subject to such injunction order, and all incidents flowing therefrom, excepting that the seller was to take steps 'to permit the reopening' of the tannery, which was done."

That within a few days after the date of the contract (September 21, 1927), defendant inspected premises other than those above described, and entered into negotiations for their purchase, and, on October 11th (the same day that he was obliged by the contract to make payment for the premises in question), purchased such other premises and paid \$1,000 on account of such purchase; that on said October 11th it was defendant's duty, under the contract, to pay money and deliver a mortgage to the escrowee, the Title & Trust Co.; that on that day complainant was ready and able to deliver possession of so much of the building on the premises as is known as the tannery, and had then offered to deliver such possession; that the vacation and delivery of possession of such part of the buildings, located upon the land, as is known as the "glove factory," was not due in any event until 10 days after said payment, and eventually not until November 5, 1927, at complainant's option; that on October 11th, complainant was not in any way in default but had in all respects complied with every duty assumed by it under the contract; and that on said last mentioned day it became defendant's duty, under the terms of the contract, to pay to said escrowee money and also deliver his notes and a mortgage, but that therein he made default, whereby he waived and excused any further performance on complainant's part.

That on October 11th, defendant gave his check for \$1,000 in purchase of said other premises, which are now occupied by him;

that up to November 7th, he had paid further sums on said other purchase which, including the \$1,000 paid down October 11th, aggregate \$19,713.32, and which are in excess of the \$19,000 which he should have paid under the contract in question; and that because of these facts it is disclosed that defendant on October 11th was financially able to consummate the contract in question.

That on the hearing before the master defendant, by his counsel, stated that "our position is that the only reason we did not comply with the contract was that complainant was unable to deliver," but that, on the contrary, the court finds that on October 11th, complainant could then, and at any time after October 5th, have made instant delivery of the tannery, that delivery of the glove factory was not due under the contract until October 21st, or (at complainant's option and subject to certain cash deductions) until November 5, 1927, that complainant has repeatedly offered to deliver possession of the glove factory in accordance with the contract, and that complainant was ready and able to comply with its agreement respecting the time of delivery of possession of all of said premises, as provided in the contract.

That in the letter of defendant's attorney (Siebel) to the escrowee of October 10th, above mentioned, it is stated that "the completion of this contract of purchase is entirely dependent upon my client's signing a petition left at my office to reopen a portion of the premises * * closed under the Prohibition Act, which my client will not sign as such was not contemplated by our original contract;" that therein is stated another reason for defendant not consummating the contract, which is without any substantial merit; that complainant's request, through the letter of his solicitor (Kolb) of September 23th above mentioned, "did not in any way include the intimation that the closing of the deal depended upon defendant's signature (to said drafted petition and bond), and defendant's reply

that we in December 1911, we had this contract made in this office
purchase which, including the \$1,000 paid down October 1911, amounted
\$12,713.11, and which was the amount of the \$10,000 which we should
have paid when the contract is executed; and that because of this
fact it is disclosed that we have an account with the Government
this so contracts the contract is executed.
That on the 10th of July, 1912, we were notified by the
Government, dated 10th July, 1912, in which the Government was
not satisfied with the contract and that complaint was made in
January, 1912, we the contract, and we were told that on October
11th, complaint was made, and it was then stated that we had
made instant delivery of the goods, and delivery of the goods
1912 was not made under the contract until October 1912, or (as
complaint's opinion and subject to certain conditions) until
November 2, 1912; that complaint was reported to the
Department of the State in accordance with the contract, and
that complaint was made and this is really what the Government
requesting the time of delivery of possession of all of said premises,
as provided in the contract.
That in the letter of complaint, dated (1912) to
the Director of Customs, dated 1912, it is stated that
"the complaint of this contract of purchase is entirely defective
and the client's is with a position that we are willing to receive
portion of the purchase - it is stated that the condition of the
we think all right as now and not contemplated by our contract
contract, but it is stated that the contract is defective and
containing the contract, which is stated to be defective and
that complaint's request, received the letter of the complaint
(1912) of complaint dated 1912, which is not in any way binding
the intention that the client to the fact of complaint dated 1912,
which is to be made (1912) and (1912), and (1912) and (1912)

(by Siebel) evidences that he did not so understand it;" that on October 5th complainant obtained the entry of an order by the U. S. District Court opening said premises, which said order "was obtained without either petition or bond by defendant;" and that on October 10th defendant and Siebel "knew that the premises had been opened without the help of any petition or bond of defendant and knew that the closing of the contract did not, in fact, depend upon defendant's signing such a petition and bond."

That defendant testified, with reference to said other property which he purchased, that "I looked at that property I suppose a couple of weeks before I bought it," and that he bought it on October 11, 1927; that, therefore, the court finds that the reason why the defendant did not conclude his purchase of complainant's premises "was not the one stated on the trial before the master (that complainant could not deliver possession), nor yet the one stated to the escrowee (that the closing depended on the defendant signing a petition and bond, which he was not obliged to sign and would refuse to sign)."

That "complainant is possessed of good title in and to the premises above described, and that good title to the same can be made to defendant."

The court in the decree ordered and adjudged that the contract in question "be specifically performed in the following manner." The court then at great length sets forth the manner of performance. No point is here made by defendant's counsel that there is any error in the decree respecting said manner of performance.

Defendant's counsel, at the end of the statement of the case in his printed brief and argument here filed, makes two contentions, viz., "that complainant (vendor) was never in position to deliver the premises to defendant (vendee), cleared of the burdens

(by label) evidence that he did not understand it, that he
 October 21st complaint against the party of the party of the
 U. S. District Court, opening said premises, which said party
 obtained against other parties or bonds by discovery, and that he
 October 21st complaint and that same of the premises and that
 opened without the help of any parties or bonds of discovery and
 knew that the closing of the contract was not, in fact, signed upon
 defendant's signing such a petition and bond."

That defendant testified, with reference to said other

property which he purchased, that "I looked at that property
 and was a sample of what I bought it, and that he made
 it on October 21, 1937, and that, therefore, the party which the
 reason why the defendant did not receive his money of discovery
 and a promise was not the fact on the 21st day of the
 but that complaint could not deliver (discovery), and that the
 and stated to the witness that the closing happened on the 21st
 my signing a petition and bond, which he was not obliged to sign
 and which return to him."

That defendant is possessed of good title to the
 the premises and that he and that party title to the premises
 be made to defendant."

The party in the party's interest was subject to the
 parties on October 21st, 1937, and that the party of the party of the
 money, the party of the party of the party of the party of the
 party of the party of the party of the party of the party of the
 there is any error in the manner of signing said contract of the
 testimony.

Defendant's counsel, at the end of the statement of the
 case in his private bill and argument here filed, asked the court
 (Linton, J.,) "that complaint (number) was never in violation of
 delivery was promised to defendant (number) of the premises

of the injunction of the U. S. District Court," and (b) "that complainant's demand that defendant's wife join in the trust deed and notes was unauthorized, thereby imposing burdens not contemplated by the contract, and which justified the purchaser in refusing to accept the title as tendered."

In our opinion the first contention is without substantial merit. The contract recognized the existence of the injunction, yet it did not provide as a condition of defendant consummating the purchase that said injunction be entirely vacated and eliminated. Complainant's only duty was to "use due diligence to permit the reopening" of the portion of the building which had been closed by order of the U. S. Court, and complainant used such diligence, and, prior to the time when defendant was to pay the \$19,000 and to deliver certain notes and give a mortgage, procured the reopening order of said U. S. Court. It is true that in this order it was provided that "none of the persons or employees, who were on said premises at the time of the violation of the Volstead Act, shall be employed upon or located upon said premises." Yet the persons and employees mentioned were not in any way connected with the defendant, and this proviso cannot be considered as having any material effect upon defendant or upon his proposed lawful business on the premises. Even if it can be so considered defendant was not justified in refusing to carry out the contract. Complainant did not agree therein to eliminate said injunctive order. And the contract provided that complainant would procure and deliver to defendant an insurance policy of the Title & Trust Co. insuring him against defects in the title, and temporarily, in lieu thereof, a report on the title, and further provided that such policy should be "conclusive evidence of good title." And it appears from the evidence that the Title & Trust Co. had indicated that it was ready to issue to defendant such an insurance policy, and "waived" the injunction. The point is fully con-

sidered in the court's decree, as above mentioned, and, as we think, correctly decided.

As to defendant's counsel's second contention (that complainant's demand that defendant's wife join in the trust deed and notes was unauthorized) the evidence discloses that complainant's solicitor drafted and delivered forms of notes to be signed by defendant and also a form of a trust deed, securing the notes, to be signed by defendant and his wife, but not that said solicitor ever specifically demanded that the wife sign the trust deed. No complaint or objection was raised at the time by defendant or his solicitor (Siebel) as to the form of the trust deed, or to the implied proposal that defendant's wife join in that deed, although in Kolb's letter, enclosing the papers, he requested that if there were any objections thereto they be immediately made so that any deviations or omissions might be remedied. The contention is apparently an afterthought, and is without merit. In order to prevent defendant's wife's right of dower and homestead accruing, superior to the right to demand the payment of the balance of the purchase price, it was proper either that the wife join in the proposed trust deed, or that there be inserted therein a suitable recital to the effect that, the deed was given to secure part of the purchase price. If defendant or Siebel preferred such a recital in the deed to defendant's wife joining in the deed, their preference should immediately have been indicated.

Defendant's counsel in his "brief of points" makes five additional points, viz: (1) "it rests in the sound legal discretion of courts of equity whether or not they will compel specific performance;" (2) "a complainant must affirmatively show the performance of all conditions required of him;" (3) "a court of equity has no power to compel a party to receive something different than that which he has contracted for;" (4) "a person is not entitled to specific

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

THE UNIVERSITY OF CHICAGO PRESS

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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On 2000-01-20, the following information was received from the U.S. Coast Guard:

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performance when he has induced the other party to the contract to believe he has abandoned it;" and (5) "equity will not force upon a vendee a title he cannot readily dispose of or one that may expose him to litigation." We have considered these points, and the arguments made in the effort to show their applicability to the present cause, and are of the opinion, under the terms of the contract and considering all the evidence introduced, that the decree appealed from is fully sustained by the evidence and the law. We think that it clearly appears that complainant sufficiently performed all of the conditions of the contract which were required of it; that defendant by the decree is not being compelled to receive something different than that which he contracted to receive; that complainant did nothing which would lead defendant to believe that it had abandoned the contract; and that the title which the court decrees the defendant shall receive, upon making the payment of the money and upon the signing and delivery of the notes and trust deed mentioned, is exactly the title he contracted to receive. And we fail to see how the taking of the title will expose defendant to litigation.

Our conclusion is that the decree appealed from should be affirmed and it is so ordered.

AFFIRMED.

Barnes, F. J., and Scanlan, J., concur.

33785

14a
WALTER MORRIS,
Appellee.

v.

NU WAY CLEANERS & DYERS,
a corporation,
Appellant.

7
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

2561A.608⁴

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a 4th class action in contract, commenced in the municipal court of Chicago on April 11, 1929, to recover the claimed value (\$150) of a certain rug, which plaintiff about September 8, 1928, delivered to defendant to be cleaned and returned, and which plaintiff claimed had not been returned, there was a trial without a jury on May 3, 1929, resulting in the court finding the issues for plaintiff, assessing his damages at \$150, and entering judgment in that sum against defendant. The present appeal followed. Plaintiff has not appeared or filed a brief in this court.

Plaintiff alone testified in his behalf. For defendant Henry Harris, its president, and Michael Mazucha, one of its drivers, gave testimony. It appears from a preponderance of the evidence that about September 8, 1928, plaintiff's wife, at the family residence, No. 1331 South Avers Avenue, Chicago, delivered a Wilton rug of small value to another of defendant's drivers to be cleaned by defendant and returned to said residence; that defendant cleaned the rug, charged \$2.25 for the work, and on September 18, 1928, instructed Mazucha to deliver the rug at said residence, and to collect said sum; that on that day Mazucha did deliver it there to a woman who said she was Mrs. Morris and

collected from her said sum in currency, which he turned in at defendant's office; and that it was not until the latter part of March, 1929, (more than six months after said transactions) that plaintiff saw Harris at defendant's office and first made the claim that said rug had not been returned. After considering all the evidence we think it clearly appears that the rug in question was not the valuable Oriental rug as claimed by plaintiff and that defendant, after cleaning it, returned it to plaintiff's residence, where it originally had been received. In our opinion the judgment against defendant cannot stand and must be reversed.

JUDGMENT REVERSED WITH FINDING OF FACT.

Barnes, P. J., and Scanlan, J., concur.

collected time for him in court, which he found to be
reluctant to attend; but that it was not until the latter part of
March, 1933, (more than six months after this investigation) that
himself and Morris at defendant's office and that the
first of this was not been returned. This notwithstanding all
the evidence to show it clearly appears that this was in question
was not the reason. Defendant was not of legal age at
that defendant, after the trial, defendant is no longer
residence, where it is clearly has been received. In my opinion
the defendant against taking no court action and may be reversed.
DEFENDANT'S MOTION FOR REVERSAL OF JURY.

Witnesses: J. J. and William, J. J. J. J.

33785

FINDING OF FACT.

We find as an ultimate fact in this case that the rug in question was on September 18, 1928, returned to plaintiff.

2075

THEORY OF THE

It is an old story that in this case the

the is question as to whether it is

plausible.

33784

ELLEN KENTON INGAL BUILDING
CORPORATION,

Appellee,

v.

ESTHER A. WIDEN,

Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

256 I.A. 609¹

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted to reverse a judgment for \$720 rendered against defendant by the municipal court of Chicago on April 16, 1929, in an action to recover rent claimed to be due on two written leases, expiring in January, 1926, for two third floor adjoining apartments in adjoining buildings, located on Bryn Mawr avenue, Chicago. Plaintiff has not entered its appearance or filed a brief in this court.

The action was commenced on December 5, 1927. In plaintiff's amended statement of claim copies of the leases are attached and made a part thereof. There is a provision in each lease that "Lessor shall furnish to Lessee * * in the radiators a reasonable amount of hot water heat or steam heat at reasonable hours, if the weather and temperature require it, from the 1st day of October until the 30th day of April in the succeeding year for the use of Lessee." Plaintiff charged that defendant had not paid the monthly rent of \$90 for each apartment for the months of September, October, November and December, 1925, and January, 1926, and that she was indebted to it in the total sum of \$900. Defendant entered her appearance, demanded a jury trial and filed an affidavit of merits claiming a constructive eviction as a defense. She alleged that she had leased both apartments for the purpose, well known to the lessor, of conducting a rooming-house; that she had been compelled to vacate and did

STATE OF NEW YORK
IN SENATE
JANUARY 1, 1935

REPORT OF THE
COMMISSIONER OF THE
LAND OFFICE

AND

STATE OF NEW YORK
IN SENATE
JANUARY 1, 1935

REPORT OF THE
COMMISSIONER OF THE
LAND OFFICE

2279

STATE OF NEW YORK
IN SENATE
JANUARY 1, 1935

REPORT OF THE
COMMISSIONER OF THE
LAND OFFICE

This report is prepared to present a summary of the work of the Land Office during the year 1934. It contains a list of the lands which have been acquired by the State during the year, and a list of the lands which have been disposed of. It also contains a list of the lands which are now in the possession of the State, and a list of the lands which are now in the possession of the people. The report is divided into two parts, the first part dealing with the acquisition of lands, and the second part dealing with the disposal of lands. The first part is divided into three sections, the first section dealing with the acquisition of lands by purchase, the second section dealing with the acquisition of lands by donation, and the third section dealing with the acquisition of lands by condemnation. The second part is divided into two sections, the first section dealing with the disposal of lands by sale, and the second section dealing with the disposal of lands by gift.

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vacate them on October 15, 1925, because (1) plaintiff had failed and refused, notwithstanding many requests, to furnish proper and reasonable heat in the radiators, and (2) plaintiff had permitted the basement, first and second floors of the premises, underneath the apartments, to become infested with mice, roaches, bugs and vermin, which had invaded the apartments to such an extent as to make them uninhabitable, and plaintiff although requested had failed and refused to exterminate the pests; and that because of these facts her roomers had moved out and she also had been compelled to move.

On November 20, 1928, the cause being called for trial and defendant not appearing, such proceedings were had as resulted in the entry of a verdict and judgment against defendant for \$900. Within 30 days defendant appeared and moved that the judgment be vacated, and the motion was continued from time to time until April 16, 1929.

As to the proceedings on April 16, 1929, the common law record discloses that on motion of plaintiff the court vacated said judgment of November 20, 1928, but finally entered a new judgment against defendant for \$720. The bill of exceptions discloses in substance that the cause came on for trial upon the merits before a jury; that plaintiff's attorney made his opening statement to them, that defendant's attorney then outlined to the jury defendant's defense of constructive eviction, as stated in her affidavit of merits; that thereupon the court stated (not in the presence of the jury) that neither of the causes as therein enumerated, even if proved, would give the right to defendant "to break the lease," and refused to allow defendant to introduce any evidence (although apparently she was ready so to do); that thereupon defendant's attorney stated that defendant had still another defense to plaintiff's action, viz., that immediately prior to the time of defend-

ant's vacation of the premises the parties verbally agreed that if defendant would surrender the premises she would be released from any further liability under the leases, and presented an amendment to defendant's affidavit of merits setting forth such additional defense; that the court refused to allow such amendment to be filed, stating that said presentation came "too late"; and that thereupon the court, upon plaintiff's attorney stating that the former verdict and judgment of \$900 was excessive and that he only wanted one for \$720, entered the judgment appealed from.

After reviewing the present transcript we are of the opinion that the judgment should not be allowed to stand, that there should be a new trial of the case, and that defendant should be given an opportunity of presenting to another jury evidence in support of her defense of constructive eviction, because of either or both of the grounds as pleaded. We think it clearly appears that the trial court erroneously did not allow defendant to proceed with her defense because of a misconception of the law. In Lawler v. McNamara, 203 Ill. App. 285, 286, it is said: "It is now the well settled law that failure of a landlord to furnish heat in an apartment in accordance with the terms of the lease amounts to a constructive eviction, which justifies the tenant in abandoning the premises." (See, also, Harmony Co. v. Kauch, 64 Ill. App. 386, 388; Thomsen v. Heinemann, 207 Ill. App. 110.) And as to the condition, as pleaded, because of mice, roaches, etc., the case of Barnard Realty Co. v. Bonwit, 139 N. Y. Supp. 1050, 1051, is in point. It is there said: "Very large numbers of people live in tenement houses, apartment houses, and apartment hotels in this city. Such tenants have, and can have, control only of the inside of their own limited demised premises. Conditions unknown to the ancient common law are thus created. This requires elasticity in the application of the principles thereof. An intolerable condition, which the tenant

neither causes nor can remedy, seems to me warrants the application of the doctrine of constructive eviction." And it is the law of this state that the question of constructive eviction is one of fact, depending upon the circumstances of the particular case, and is to be determined by a jury. (Kinsey v. Zimmerman, 329 Ill. 75, 80; Gibbons v. Hoofeld, 299 Ill. 453, 464.)

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMAND D.

Barnes, P. J., and Scanlan, J., concur.

1991-1992, 1993-1994, 1995-1996, 1997-1998, 1999-2000, 2001-2002, 2003-2004, 2005-2006, 2007-2008, 2009-2010, 2011-2012, 2013-2014, 2015-2016, 2017-2018, 2019-2020, 2021-2022, 2023-2024, 2025-2026, 2027-2028, 2029-2030, 2031-2032, 2033-2034, 2035-2036, 2037-2038, 2039-2040, 2041-2042, 2043-2044, 2045-2046, 2047-2048, 2049-2050, 2051-2052, 2053-2054, 2055-2056, 2057-2058, 2059-2060, 2061-2062, 2063-2064, 2065-2066, 2067-2068, 2069-2070, 2071-2072, 2073-2074, 2075-2076, 2077-2078, 2079-2080, 2081-2082, 2083-2084, 2085-2086, 2087-2088, 2089-2090, 2091-2092, 2093-2094, 2095-2096, 2097-2098, 2099-2100, 2101-2102, 2103-2104, 2105-2106, 2107-2108, 2109-2110, 2111-2112, 2113-2114, 2115-2116, 2117-2118, 2119-2120, 2121-2122, 2123-2124, 2125-2126, 2127-2128, 2129-2130, 2131-2132, 2133-2134, 2135-2136, 2137-2138, 2139-2140, 2141-2142, 2143-2144, 2145-2146, 2147-2148, 2149-2150, 2151-2152, 2153-2154, 2155-2156, 2157-2158, 2159-2160, 2161-2162, 2163-2164, 2165-2166, 2167-2168, 2169-2170, 2171-2172, 2173-2174, 2175-2176, 2177-2178, 2179-2180, 2181-2182, 2183-2184, 2185-2186, 2187-2188, 2189-2190, 2191-2192, 2193-2194, 2195-2196, 2197-2198, 2199-2200, 2201-2202, 2203-2204, 2205-2206, 2207-2208, 2209-2210, 2211-2212, 2213-2214, 2215-2216, 2217-2218, 2219-2220, 2221-2222, 2223-2224, 2225-2226, 2227-2228, 2229-2230, 2231-2232, 2233-2234, 2235-2236, 2237-2238, 2239-2240, 2241-2242, 2243-2244, 2245-2246, 2247-2248, 2249-2250, 2251-2252, 2253-2254, 2255-2256, 2257-2258, 2259-2260, 2261-2262, 2263-2264, 2265-2266, 2267-2268, 2269-2270, 2271-2272, 2273-2274, 2275-2276, 2277-2278, 2279-2280, 2281-2282, 2283-2284, 2285-2286, 2287-2288, 2289-2290, 2291-2292, 2293-2294, 2295-2296, 2297-2298, 2299-2300, 2301-2302, 2303-2304, 2305-2306, 2307-2308, 2309-2310, 2311-2312, 2313-2314, 2315-2316, 2317-2318, 2319-2320, 2321-2322, 2323-2324, 2325-2326, 2327-2328, 2329-2330, 2331-2332, 2333-2334, 2335-2336, 2337-2338, 2339-2340, 2341-2342, 2343-2344, 2345-2346, 2347-2348, 2349-2350, 2351-2352, 2353-2354, 2355-2356, 2357-2358, 2359-2360, 2361-2362, 2363-2364, 2365-2366, 2367-2368, 2369-2370, 2371-2372, 2373-2374, 2375-2376, 2377-2378, 2379-2380, 2381-2382, 2383-2384, 2385-2386, 2387-2388, 2389-2390, 2391-2392, 2393-2394, 2395-2396, 2397-2398, 2399-2400, 2401-2402, 2403-2404, 2405-2406, 2407-2408, 2409-2410, 2411-2412, 2413-2414, 2415-2416, 2417-2418, 2419-2420, 2421-2422, 2423-2424, 2425-2426, 2427-2428, 2429-2430, 2431-2432, 2433-2434, 2435-2436, 2437-2438, 2439-2440, 2441-2442, 2443-2444, 2445-2446, 2447-2448, 2449-2450, 2451-2452, 2453-2454, 2455-2456, 2457-2458, 2459-2460, 2461-2462, 2463-2464, 2465-2466, 2467-2468, 2469-2470, 2471-2472, 2473-2474, 2475-2476, 2477-2478, 2479-2480, 2481-2482, 2483-2484, 2485-2486, 2487-2488, 2489-2490, 2491-2492, 2493-2494, 2495-2496, 2497-2498, 2499-2500, 2501-2502, 2503-2504, 2505-2506, 2507-2508, 2509-2510, 2511-2512, 2513-2514, 2515-2516, 2517-2518, 2519-2520, 2521-2522, 2523-2524, 2525-2526, 2527-2528, 2529-2530, 2531-2532, 2533-2534, 2535-2536, 2537-2538, 2539-2540, 2541-2542, 2543-2544, 2545-2546, 2547-2548, 2549-2550, 2551-2552, 2553-2554, 2555-2556, 2557-2558, 2559-2560, 2561-2562, 2563-2564, 2565-2566, 2567-2568, 2569-2570, 2571-2572, 2573-2574, 2575-2576, 2577-2578, 2579-2580, 2581-2582, 2583-2584, 2585-2586, 2587-2588, 2589-2590, 2591-2592, 2593-2594, 2595-2596, 2597-2598, 2599-2600, 2601-2602, 2603-2604, 2605-2606, 2607-2608, 2609-2610, 2611-2612, 2613-2614, 2615-2616, 2617-2618, 2619-2620, 2621-2622, 2623-2624, 2625-2626, 2627-2628, 2629-2630, 2631-2632, 2633-2634, 2635-2636, 2637-2638, 2639-2640, 2641-2642, 2643-2644, 2645-2646, 2647-2648, 2649-2650, 2651-2652, 2653-2654, 2655-2656, 2657-2658, 2659-2660, 2661-2662, 2663-2664, 2665-2666, 2667-2668, 2669-2670, 2671-2672, 2673-2674, 2675-2676, 2677-2678, 2679-2680, 2681-2682, 2683-2684, 2685-2686, 2687-2688, 2689-2690, 2691-2692, 2693-2694, 2695-2696, 2697-2698, 2699-2700, 2701-2702, 2703-2704, 2705-2706, 2707-2708, 2709-2710, 2711-2712, 2713-2714, 2715-2716, 2717-2718, 2719-2720, 2721-2722, 2723-2724, 2725-2726, 2727-2728, 2729-2730, 2731-2732, 2733-2734, 27

^aSee ref. 6; ^bsee ref. 7.

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The population of the United States has increased from about 100 million in 1900 to over 200 million in 1950, and the majority of this increase has been in urban areas. This has led to a concentration of population in a few large cities, which has in turn led to a number of problems, such as overcrowding, pollution, and traffic congestion.

... ..

DATE: 07-17-98 BY: [illegible] FOR: [illegible]

[illegible]

THE UNIVERSITY OF CHICAGO

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ISADORE ZIVEN,
Appellee,

v.

M. SAMUELS & COMPANY,
a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

256 I.A. 609

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant to recover the sum of \$225, claimed to be due for the February, 1929, rent of a store at No. 1133 Milwaukee avenue, in plaintiff's building in Chicago, by virtue of a written lease of the premises, commencing November 1, 1925, and running for a period of ten years, and signed by the parties. During May, 1929, a trial was had before a jury, resulting in a verdict in plaintiff's favor for \$225, upon which judgment in that sum was entered against defendant, and the present appeal followed.

Plaintiff's declaration, in addition to the common counts, consisted of a special count in which a copy of the lease, together with a rider and a floor plan of the store attached thereto, were set forth in full. To the declaration defendant filed a plea of the general issue and also a notice, under section 46 of the Practice Act, of special matter intended to be relied upon as a defense. The notice stated in substance that plaintiff, during the months of December, 1928, and January, 1929, failed and refused to furnish heat to the store, in accordance with clause 10th of the lease, and that in consequence defendant was compelled to and did vacate the store, and surrendered possession thereof, on or about February 10, 1929. Subsequently plaintiff filed a "replication" to the effect that he was "not guilty of the charge of failure to provide heat."

The lease is dated January 26, 1926, before plaintiff's building had been constructed. After the store was ready for occupancy defendant took possession and thereafter for several years continuously paid the monthly rent up to and including January, 1929. For the first eighteen months of the period the store was occupied by defendant, and then by various sub-tenants of defendant. The last sub-tenant was Johanna Witt, who took possession about November 10, 1928, under a six-months' written lease from defendant, and remained in the store until January 24, 1929, when she moved out because, as she testified, the store "was too cold."

By the 6th clause of the lease it is provided that the tenant (defendant) "shall have the right to make alterations, divisions, changes and improvements to and remodel the premises, inside and outside, at its own expense," and that the tenant "may remove and take for its own use the present front in completing said remodeling and improvements." By the 10th clause the lessor (plaintiff) "agrees to furnish heat to the demised premises during all months when same may be necessary without cost to the tenant." By the 4th clause of the rider it is provided that the lessee's taking possession of the store-room "shall constitute an attornment and approval of the lessor having made a substantial compliance with the requirements" as shown on said attached plan. And on the plan is the written statement that the radiators shall be installed "where designated by tenant." By the 5th clause permission is given to the lessee to sub-let all or any portion of the premises, except as to certain named businesses, without obtaining consent of the lessor.

On February 12, 1929, defendant, by its agent, Darnell, notified plaintiff in writing that it had vacated the premises because of plaintiff's "failure to furnish heat" in accordance with the terms of the lease. At the same time Darnell left the keys

of the premises with plaintiff.

It is first contended by defendant's counsel that the verdict is manifestly against the weight of the evidence on the question whether plaintiff during the months of December, 1928, and January, 1929, had furnished heat to the store as required by the lease. On this question the evidence was conflicting. Plaintiff made out a prima facie case by introducing the lease, with attached papers, and showing defendant's possession and payment of the monthly rent for a period of several years, and also showing that there was due from it the rent for February, 1929, amounting to \$225. Thereupon defendant, to maintain its defense of constructive eviction, as stated in its said notice, introduced the testimony of various witnesses tending to show that during said months sufficient heat had not been furnished to the store, that sometimes the radiators were cold, and that the temperature of the store never was above 55 or 59 degrees, Fahrenheit, etc. Plaintiff's evidence in rebuttal disclosed that the building was three stories in height and had six occupied stores on the street level and occupied rooms above; that there was a general heating plant for the entire building, from which by proper pipes heat was conveyed to all stores and rooms, including the store in question; that during said months the heating plant was in constant operation and in charge of an experienced janitor, etc.; and that no complaints as to the heat furnished had been made by the tenants of said other stores or of the rooms above. Plaintiff's evidence further disclosed that if the store in question was at times uncomfortably cold it was due to defendant's own acts after plaintiff had installed radiators in the store as originally directed by defendant; that defendant had remodelled the store, had removed the original front and replaced it with a different one (thereby increasing the space to be heated) and had replaced the front one of the two radiators in the store in such a position that the supply pipe thereto was made much longer, and the

of the premises with Plaintiff. It is first contended by Defendant that the record is conclusively against the fact of the existence of the question whether Plaintiff during the tenure of the contract, 1938, and January, 1939, had furnished him the share of royalties by the same. On this question the evidence was conflicting. Plaintiff made out a prima facie case by showing that the same, after deducting 10 per cent, was being distributed to Plaintiff and payment of the monthly rent for a period of several years, and also showing that there was due from him for the rent for 7 months, 1938, amounting to \$125. Thereupon Defendant, to maintain the balance of the contract, offered evidence in the form of a notice, introduced the testimony of various witnesses tending to show that during this period Plaintiff had not been furnished in the above, but contended that the same was not paid, and that the termination of the contract was due to the fact that Plaintiff's evidence in respect to the above was not sufficient to show that he was in receipt of the same. The effect level was occupied from 1938 to 1939 and a general hearing being for the entire period, 1938 and 1939, Plaintiff's evidence was reviewed as all other and relevant, including the fact in question that during this period the hearing level was in constant operation and in the form of an expenditure of \$1,000.00 and that no royalties as to the same were paid even many of the months of each year. Thereafter, Plaintiff's evidence was reviewed and it was found that the same in question was of such magnitude that it was not in Defendant's own case that Plaintiff had furnished evidence in the form of an affidavit introduced by Defendant; that Defendant had introduced the same, and removed the original from the record and replaced it with a different one (obviously introducing the same to be heard) and had replaced the first one of the evidence in the form in which a position that the copy of the same was not made, and the

size of the pipe was made considerably smaller, thereby decreasing the amount of steam conveyed to the radiator; and that the efficiency of the radiator had further been reduced by covering a portion of it by a wooden shelf and by a curtain. Considering all the evidence we think that it amply sustains the verdict.

Counsel further contend that the court erred in admitting such of plaintiff's evidence in rebuttal as is last above outlined because it is "contrary to the case as made by the pleadings" and was a "surprise" to defendant. The argument is, as we understand it, that, inasmuch as defendant had given notice under its plea of the general issue of the special matters of defense it would rely upon viz., plaintiff's failure to furnish heat, etc., and as plaintiff had filed a "replication" denying such failure, the sole issue was whether plaintiff had failed to furnish heat, and he should not have been allowed to introduce any evidence tending to show any "excuse" for such failure. In our opinion the contention and argument are without substantial merit. Defendant gave notice under the statute of its special defense, in substance that it was not liable for the rent sued for because it had been constructively evicted from the store because of plaintiff's failure to furnish heat in violation of the terms of the lease. No "replication" to this notice was necessary or, indeed, permissible. In speaking of such notice under the statute our Supreme Court, in Bailey v. Valley National Bank, 127 Ill. 332, 338, said: "No reply, either of admission or denial, of the plaintiff, is required, or permissible thereto, and no issue, either of law or of fact, can be raised thereon." (Citing Burgvin v. Babcock, 11 Ill. 28; Munt v. Weir, 29 Ill. 83.) And in White v. Bourquin, 204 Ill. App. 83, 96, it is said: "The notice calls for no answer from the plaintiff, and no issue of law or fact can be made upon it, and no question arises until the defendant offers evidence to support it on the trial. If the notice is then found defective or does not state a good defense, the court will not

size of the sign was made sufficiently small, through the
 the amount of strain conveyed to the witness; and that the witness
 of the radiator had further been reduced by covering a portion of
 it by a wooden shelf and by a curtain. Considering all the witnesses
 we think that it ought to sustain the verdict.

General Tamm, counsel for the State, in his
 brief of Plaintiff's evidence in a case of this kind, has
 pointed out its weakness as well as its strength, and
 was a "surprise" to defendant. The argument is, as we understand it,
 that, inasmuch as defendant had been advised under the plan of
 the general issue of the special verdict of damages to which only
 some of Plaintiff's evidence is relevant, that the Plaintiff
 had filed a "petition" for a writ of habeas corpus, and that
 Plaintiff's evidence is relevant to the writ, and that the
 same should be allowed as evidence in the writ proceeding, and that
 for such reasons, in our opinion, the court should not sustain the
 verdict substantial weight. Defendant says that the court has
 of its special verdict, in substance that it was not liable for the
 same and for damages it has been contractually released from the
 state because of Plaintiff's failure to furnish heat in violation of
 the terms of the lease. To this Plaintiff in this case has answered
 by, indeed, petitioning. In answer to each motion under the
 statute and a proper Court in Ill. v. Valley & Electric Co., 123
Ill. 335, 338, said: "The result, either of admission or denial, of
 the Plaintiff, as required, on reasonable grounds, and we found,
 either of law or of fact, can be taken account of. (Citing Ill. v.
McDonough, 11 Ill. 381, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

admit evidence under it." On the trial of the present case the burden was upon defendant to prove and maintain its defense of constructive eviction, as outlined in the notice, and we think that, under the pleadings, plaintiff had the right in rebuttal to produce evidence tending to show not only that he had not failed to furnish heat to the store during said months, by means of the same heating plant and connecting pipes as before, but also that, if an insufficient amount of heat came from the radiators in the store, it was the result of the acts of defendant and its sub-tenants and not of plaintiff's acts. And we cannot see how defendant could have been surprised by any of plaintiff's evidence.

Complaint also is made of the giving of the 5th instruction offered by plaintiff. In view of the terms of the lease and of all the evidence we do not think the giving of the instruction was error. Nor do we think that the court erred in refusing to grant defendant's motion for a new trial.

The judgment of the circuit court should be affirmed and it is so ordered.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

admit evidence that it is. On the part of the present case the
burden is upon defendant to prove and maintain the defense of
consent or invitation, as outlined in the earlier case. It is
first, under the principle, that the state is required
to produce evidence tending to show not only that he has not failed
to furnish help to the state but also that he has not failed
to furnish help and information to the state, but also that
it is an independent element of proof that the defendant is the
state, it is the duty of the state to prove and maintain the
burden of plaintiff's case. And as to the burden of proof
have been satisfied by one of plaintiff's witnesses.
Plaintiff also is made to the effect of the investigation
satisfied by plaintiff. In view of the facts of the case and of all
the evidence we do not think the finding of the investigation was correct.
Nor do we think that the state was in violation of its duty to
action for a new trial.
The judgment of the circuit court should be affirmed and
it is so ordered.

1917.

Barnes, P. J., and Graham, J., concur.

33828

77a
PEOPLE, Etc., ex rel. ISADORE
A. DEUTCH,
Plaintiff and Appellee,

vs.

CITY OF CHICAGO et al.,
Defendants and Appellants.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

256 I.A. 609³

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On July 11, 1928, the relator filed a petition for a mandamus in the circuit court of Cook county against the City of Chicago, its Mayor, City Comptroller and City Treasurer, the members of its City Council, George E. Nye, its Chief Inspector in the department of "Steam Boilers, Steam and Cooling Plants and Smoke Abatement," and the members of its Civil Service Commission. After making numerous allegations of fact he prayed that defendants cause him to be restored to the office or position of Junior Mechanical Engineer (from which he was unlawfully removed on January 17, 1928) and to all the duties and emoluments of the position "by whatever name it is now or hereafter may be known, and to whatever department of the municipal government of Chicago its execution may be allocated," in connection with "smoke control or smoke abatement, or both;" that, so long as the City continues to employ men to discharge such duties, and so long as he is ready and able to discharge them, defendants keep him in such position; that they cause to be appropriated sufficient funds to pay him his salary (\$2,640 per year) from January 17, 1928, to December 31, 1928, and thereafter; that they make all necessary returns in payrolls and certificates required to entitle him to receive such salary from January 17, 1928, up to the time of his restoration to said position; and that they thereafter pay him his salary as it shall accrue, etc.

1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 26

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FORM NO. 10 (REVISED) FEBRUARY 1964

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• 2017, 2018

On June 25, 1929, defendants filed a second amended answer to the petition, and early in July, 1929, there was a trial before the court without a jury, at which considerable evidence was introduced by the respective parties.

On July 10, 1929, the judgment order appealed from was entered, in which the court found that for many years prior to January 17, 1928, there was in existence in the civil service of the City, and under its Civil Service Commission, certain positions known as Junior Mechanical Engineers; that in August, 1926, petitioner was duly certified by the Commission and duly appointed by the Health Commissioner, the then appointing officer, as an incumbent of one of said Junior Mechanical Engineer positions, and he immediately entered upon his duties and continued to perform them until January 17, 1928, when he was excluded therefrom; that on said date he was a de jure incumbent of the position, with annual salary of \$2,640; that the City, by George E. Nye, its duly appointed officer, unlawfully excluded and has since excluded him from the position, and deprived him of his salary, "although there has never been any lack of work for him as such incumbent," and although he has always been ready, able and willing to perform his duties; that the City has unlawfully failed and neglected to make appropriation for the salary for the position for the period from January 17, 1928, to January 31, 1929, and that on said last mentioned date there was due to petitioner for salary the sum of \$2,742.66, which has not been paid; that at the time the present petition was filed (July 11, 1928), and at all times up to January 31, 1929, petitioner was entitled to be restored to his position; that on January 31, 1929, as alleged in defendants' answer and admitted by him, petitioner was restored to his position; and that "it is now needless to award a writ of mandamus for that purpose, and this cause now

On June 26, 1933, the following was a summary of the
status of the position, and was in July, 1933, there was a
first salary for work without a July, at which time the salary
change was indicated by the respective parties.
On July 15, 1933, the 14 days extra working time
was entered, in which the extra time for work done prior
to January 17, 1933, there was an increase in the daily salary
of the City, and under the Civil Service Commission, there is
position known as Junior Technical Engineer; that is August,
1933, position was only created by the Commission and this
positioned by the Civil Service Commission, the first appointed officer,
as an Assistant of one of said Junior Technical Engineer position,
and he immediately started from his duties and working in position
from July 15, 1933, when he was appointed Assistant; that
on said date he was a 14 day increase of the position with annual
salary of \$1,000; that the City, by Order No. 1933, the day appointed
officer, immediately indicated that the same was added at the time the
position, and indicated him of his salary. Although there was no
even any look at work for the 14 days increase, and although he
has always been ready, able and willing to perform his duties; and
the City has definitely failed and neglected to make compensation
for the salary for the position for the period from January 17,
1933, to January 21, 1933, and that on said date mentioned above
there was no indication for salary for the day of 17, 1933, when
he was first appointed; that at the time the present position was added
(July 15, 1933), and at that time as to January 21, 1933, position
was entitled to be received for his position; that on January 21,
1933, as alleged in the complaint, he was not entitled to his salary
there was no reason as to his position; and that it is now necessary
to make a writ of mandamus for that purpose, and that there may

proceeds to compel appropriation for and payment of said back salary." And the court ordered and adjudged that a writ of mandamus forthwith issue commanding defendants (each to do his part) to cause an appropriation ordinance to be passed and to appropriate said sum of \$2,742.66, and interest, for payment to petitioner of the amount of his salary from January 17, 1928, to January 31, 1929, and that upon said sum being appropriated that defendants cause it to be paid to him.

On the trial the following facts in substance were disclosed: Prior to June, 1926, the City had a department known as the Health Department which had a Bureau of Sanitary Engineering in which there was a division of "Smoke Control." The Health Commissioner of the City was in charge of the department. On June 8, 1926, a written examination was held by the Civil Service Commission of applicants for the positions of Junior Mechanical Engineers in said division, and petitioner with others took the examination, passed, and was placed upon the eligible register. In August, 1926, on requisition of the Health Commissioner, petitioner with others was certified by the Civil Service Commission, and appointed as one of said engineers and entered upon his duties. He served for the probationary period of six months and continued to serve,--his appointment thereby becoming complete. Early in 1926, the City Council, by ordinance, had made an appropriation for the salaries of a considerable number of such engineers for the division of Smoke Control in said Health Department. In June, 1927, by another ordinance, the division of Smoke Control was detached from the Health Department and transferred to the enlarged department of "Steam Boilers, Steam and Cooking Plants," to the title of which there were added the words "and Smoke Inspection." George E. Nye was the head of this boiler department and thereafter petitioner,

and other such engineers, continued in their positions under Nye, doing the same work, performing the same duties, and receiving their salaries until January 17, 1928. In the appropriation ordinance of 1928 (passed January 16th) monies were appropriated for said boiler department for only five of such engineers, of which petitioner was not one, but monies also were appropriated for five "Junior Combustion Engineers" (later increased to eight) and for forty-two (42) "Boiler Inspectors," an increase of twenty-one (21) in the number of such inspectors. On the day said appropriation ordinance was passed Nye, by letter, excluded petitioner from further service in said boiler department, saying: "In accordance with the terms of the 1928 appropriation bill your position as Junior Mechanical Engineer is abolished, and you will be separated from this department on January 17, 1928, and your name restored to the Civil Service eligible list." On this date also Nye dismissed from the department more than ten additional persons who had been serving as such engineers. There was then and thereafter plenty of work for petitioner and the other dismissed employees to do. Nye almost immediately, and with the concurrence of the Civil Service Commission, made temporary sixty-day appointments of numerous persons to do the same work in the department which had formerly been done by petitioner and said other dismissed employees,--six with the title of "Boiler Inspectors" and eight with the title of "Junior Combustion Engineers," and who were not on the eligible register of the Commission. Subsequently, at the expiration of said sixty days, Nye, with concurrence of the Commission, unlawfully renewed said appointments for another sixty days, and continued so to do every sixty days for the period of about one year. During all these times petitioner remained on the eligible register and was demanding restoration to his former position. Early in

and a few days afterwards, mentioned in their positions under the
below the same title, mentioning the same subject, and receiving
their salaries until January 14, 1914. In this connection the
names of 1928 (posted January 14th) names were mentioned for
with their agreement the only thing to which attention, at which
petition was not one, but names that were mentioned for
five "Junior Commission Engineers" (Junior Engineers to 1914) and
for 1914-15 (42) "Junior Engineers", an increase of twenty-one
(21) in the number of men interested. On the 14th of January
also attention was paid to the fact that, according to the
further service is well better than at, which: "The Commission
with the terms of the 1914 Commission will have position as
Junior Commission Engineers in 1914, and the 14th of January
from this statement on January 14, 1914, and the 14th of January
in the Civil Service Commission, in this case, the
dismissed from the department more than one hundred names and
had been serving as such engineers. There are also and therefore
a list of names for position and the other names mentioned as
24. The Civil Service Commission, and with the knowledge of the Civil
Service Commission, and the names of 1914-15, and the 14th of January
persons as to the same were in the department when the Commission
was done by petition and the other names mentioned, and the
with the Civil Service Commission, and the 14th of January
"Junior Commission Engineers", and the 14th of January
register of the Commission, and the 14th of January
and 1914, 1914, with the knowledge of the Commission, and the 14th of January
thereby said representatives for another year, and the 14th of January
to the Civil Service Commission for the names of 1914-15, and the 14th of January
all these names mentioned in the Civil Service Commission and
was mentioned mentioned in the Civil Service Commission, and the 14th of January

January, 1929, the City Council passed the 1929 appropriation ordinance, in which monies were appropriated for said department for the same number of engineers and boiler inspectors as in the 1928 ordinance. On January 23, 1929, petitioner was certified and appointed to his former position as a Junior Mechanical Engineer, and on January 31, 1929, was reinstated and assigned to do the same line of work which he had formerly done prior to his dismissal on January 17, 1928. At the time of the trial he was performing the duties of the position.

We think the facts as contained in the present transcript disclose a noticable violation of the letter and spirit of the Civil Service law, that petitioner was for more than a year unlawfully separated from this position solely for political reasons, and that the court was fully justified under the facts and the law in issuing the writ of mandamus as stated, whereby petitioner will be enabled to recover the back salary of which he has unlawfully been deprived. Counsel for defendants, contending that the court erred in awarding the writ, place considerable reliance upon the case of Fitzsimmons v. O'Neill, 214 Ill. 494, where it was decided in substance that the failure of a city council, acting in good faith and for the purpose of reducing expenses, to make an appropriation for a position in the civil service, the duties of which are added to those of another office without additional compensation, amounts to an abolishment of the first mentioned position and is not a violation of the Civil Service law. But the case is not applicable to the facts of the instant case. Here there was ^{an} absence of good faith on the part of some of the defendants and there was no apparent desire to reduce expenses. In the 1928 appropriation ordinance the number of "Junior Mechanical Engineers" for the department was considerably decreased, but the

number of so-called "Boiler Inspectors" was greatly increased, indeed doubled, and the total appropriation for the department was increased. The amount and character of the work to be done in the particular "Smoke" division remained the same. The change in the name of some of the positions from that of "Junior Mechanical Engineer" to that of "Boiler Inspector" was apparently a mere subterfuge, and made for the purpose of lending color to the position taken by Nye, as head of the department, that some of said engineering positions had been abolished, and to his subsequent actions, concurred in by the Commission, in making and continuing to make said sixty-day appointments of persons who were assigned to do, or to attempt to do, the same character of work which had been done by petitioner, and others similarly affected, prior to January 17, 1928. In People v. Coffin, 282 Ill. 599, 610, it is said:

"While the city has a right to actually and in good faith discontinue any position when the same becomes no longer necessary or useful, yet neither it nor the commission had any right to continue the position in force and to remove appellee until charges had been preferred against him and sustained by the commission in the manner provided by section 12 of the Civil Service law. (City of Chicago v. Luthardt, 191 Ill. 516.) Neither the city nor the commission, nor both combined, can legally abolish a position temporarily for the unlawful purpose of later re-establishing it and installing therein another person as employee."

See, also, in this connection, the case of McArdle v. City of Chicago, 216 Ill. App. 343, 354-5. And in People v. Thompson, 316 Ill. 11, 16, it is said:

"A judgment awarding the writ of mandamus to compel reinstatement in office may include a command to pay salary. (People v. Coffin, 279 Ill. 401; 18 R. C. L. 260; State v. Rundberg, (Mo.) 236 S.W. 986.) The rule in this State is, that the payment in good faith of the salary of an officer to a de facto officer constitutes a bar to an action by the de jure officer for the salary paid to the de facto officer. (People v. Schmidt, 281 Ill. 211.) The well defined exception to the above rule is that where the relator is illegally removed from his

office and the salary has been paid to another person illegally appointed in his stead a writ of mandamus will be awarded requiring the re-instatement of the relator in office and the payment of his salary during his illegal removal. (People v. Brady, 262 Ill. 578; People v. Stevenson, 270 id. 369; People v. Coffin, supra.)"

Our conclusion is that the order of the circuit court appealed from should be affirmed and it is so ordered.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

33858

78a
SIMON J. PEYSER,
Plaintiff in Error,

v.

EDWARD LYNCH,
Defendant in Error.

7
ERROR TO SUPERIOR
COURT, COOK COUNTY.

256 I.A. 609⁴

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant to recover damages for personal injuries received while he was crossing Crawford avenue towards the west at or near Madison Street, Chicago, by being struck and thrown down by defendant's automobile moving southerly in Crawford avenue on December 12, 1928. A trial was had before a jury in June, 1929, resulting in a verdict being returned in defendant's favor. By this writ of error plaintiff seeks to reverse the judgment rendered against him upon the verdict.

The bill of exceptions, contained in the transcript and certified by the trial judge, is unusual in that the testimony given upon the trial is not preserved. It is stated that plaintiff, to maintain the issues on his part, introduced testimony and other evidence which "fairly tended to prove the allegations of, and the cause of action as stated in, the first and second counts of the declaration; that thereupon defendant introduced other testimony and evidence which "fairly tended to disprove" these allegations, etc.; and that the evidence "was conflicting". It is further stated that the court, of its own motion, instructed the jury to disregard the third count (charging wilful and wanton negligence), and that thereupon the court gave to the jury 18 instructions, 5 of which were offered by plaintiff and 13 by defendant. These instructions are contained in the bill of exceptions.

The first count, alleging that at the time and place plaintiff was in the exercise of due care for his own safety, charged defendant with general negligence in the control and operation of

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Approved for release January 30, 1990 by NSA/EOP

10-10-1944

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U.S. DEPT. OF AGRICULTURE, BUREAU OF PLANT INDUSTRY, WASHINGTON, D.C. 20250-1508

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1992-1993

Abstract. Three different types of conditions in the city of Copenhagen

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100-443886-1000

the automobile, and the second count with negligence in operating the automobile at a dangerous and excessive rate of speed, to-wit, 30 miles an hour, in violation of the statute. Defendant pleaded the general issue.

The only errors assigned and argued relate to the given instructions offered by defendant. It is contended by plaintiff's counsel that the court erred in giving on defendant's behalf an "undue number" of instructions on the subject of plaintiff's contributory negligence, each of which concluded with the words "then your verdict should be not guilty" or similar words. We do not think there is any substantial merit in the contention. Whether plaintiff was guilty of negligence which proximately contributed to the accident and his injuries was a material question in the case. The several instructions presented different aspects of the question and each correctly stated the law. As said in Carson Pirie Scott & Co. v. Chicago Ry. Co., 309 Ill. 346, 352: "The elaboration of the rule in different instructions did not add anything material to the defense, but as there was nothing incorrect in them they are not ground for reversal."

Complaint is made of the omission of one word in instruction No. 14, offered by defendant. Other parts of the instruction rendered that omission harmless, and the jury could not have been misled, as contended, when the language of the entire instruction is considered. (See Atchison v. McKinnie, 233 Ill. 106, 112.) And we do not think that the giving of instruction No. 16, offered by defendant, constituted reversible error for the reasons as urged by counsel. In view of the issues as framed by the pleadings, and in the absence of any detailed statement in the bill of exceptions as to the evidence introduced, we cannot say that the court committed any reversible error in giving any or all of the instructions.

The judgment of the superior court is affirmed.

Barnes, P. J., and Seanlan, J., concur.

AFFIRMED.

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PEOPLE, etc. for the use of
ATLAS COPPER & BRASS MFG. CO.,
a corporation,

Appellant,

v.

BERNARD W. SNOW, bailiff of the
Municipal Court of Chicago, and
MARYLAND CASUALTY COMPANY,
a corporation,

Appellee.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

256 I.A. 609⁵

MR. JUSTICE ORIDLEY DELIVERED THE OPINION OF THE COURT.

In an action in debt, commenced in the superior court of Cook county on November 29, 1927, upon the official bond of the bailiff of the municipal court of Chicago, because of his failure to levy an execution upon certain goods which one H. Galowich (the execution debtor) had replevied, there was a trial before a jury in June, 1929, resulting in the court directing the jury to return a verdict for defendants. Upon judgment being entered against plaintiff for costs the present appeal followed.

Plaintiff's declaration consisted of a special count. After stating the execution and approval of Snow's official bond as bailiff, with said Casualty Co. as surety, plaintiff assigned as a breach of the bond that on October 13, 1926, the Atlas Copper & Brass Co. recovered a judgment in the municipal court against Galowich for \$300.94, and costs; that on May 28, 1927, an alias writ of execution on the judgment was issued, and subsequently placed in Snow's hands; that afterwards and before the return day of the writ there were certain goods in Galowich's possession in Chicago "subject to execution", of which fact Snow, as bailiff, had notice and out of which he "ought to have caused to be made the said monies;" that nevertheless he, in disregard of his

official duty, did not and would not before said return day cause to be made the monies; and that on August 27, 1927, he "falsely and deceitfully" returned the writ "no property found and no part satisfied;" to plaintiff's damage, etc.

Defendants in their plea alleged in substance that Snow, as bailiff, did not disregard or neglect to perform any duty required of him by law; that on June 1, 1927, said execution was placed in Snow's hands, as bailiff, to be executed; that on July 5, 1927, Snow duly made demand upon Galowich; that on July 12, 1927, Galowich filed a schedule of his property; that Snow was unable to find any property of Galowich in Chicago subject to execution; and that, accordingly, he returned the execution "no property found," etc. And defendants denied that at any time during the life of the writ Snow had knowledge that Galowich had any property in Chicago that was subject to execution, or that he "falsely and deceitfully" made said return on the writ.

On the trial plaintiff introduced certain writings or documents and called Galowich as a witness. Defendants introduced certain other writings or documents. From all the evidence the following facts in substance appear: The Atlas Copper & Brass Co. obtained said judgment in the municipal court against Galowich, and said execution was placed in Snow's hands, as bailiff, on June 1, 1927, and he made demand upon Galowich, who, on July 12, 1927, filed a schedule, claiming that he had no property subject to execution. On July 30, 1927, while the execution was still in Snow's hands, Galowich commenced an action in replevin in the same court against the White City Amusement Co., a corporation, by the filing of the usual affidavit and the giving of the usual bond. In the affidavit Galowich stated that he was the owner and lawfully entitled to the possession of certain scrap copper and scrap metal, "of the

value of \$250," in the possession of the Amusement Co. at 63rd street and South Park avenue, Chicago. The replevin writ was issued and Snow under it took from the possession of the Amusement Co. 6300 pounds of copper and 1000 pounds of lead and delivered these goods to Galowich, who receipted therefor on the back of the writ. Snow also served the Amusement Co., which, on August 10, 1927, entered its appearance in the replevin suit and demanded a jury trial. On January 5, 1928, the replevin suit was tried and the court entered an order finding that the right in the property was in the Amusement Co., and adjudging that it recover from Galowich possession of the property and that a writ of retorno habendo issue. It appears that after this judgment order was entered the court endorsed thereon the words "satisfied in court" and further ordered that Galowich be given leave to withdraw from the files his replevin bond.

It will be noticed that Snow, under the replevin writ, replevied the goods and delivered them to Galowich at a time when plaintiff's execution on said judgment for \$300.94 was still in Snow's hands unsatisfied, but that said execution was returned by Snow unsatisfied on August 27, 1927, several months before the final judgment in the replevin suit was entered. Galowich testified that shortly after the goods were replevied and turned over to him, he sold them to a third party at a price in excess of the amount of plaintiff's judgment. Upon the trial plaintiff's attorney contended that Snow, after taking the goods under the replevin writ and after he had delivered them to Galowich, should have levied upon them under plaintiff's execution, but the trial court held in substance that the replevied goods were in custodia legis until January 5, 1928, when the replevin suit was decided; that at no time prior to August 27, 1927, (when the execution ceased to have life) could

Shaw, as bailiff, have lawfully levied upon the replevied goods by virtue of said execution; and that, hence, plaintiff was not entitled to recover anything of defendants on Shaw's official bond. It was on this theory of law that the court directed the jury to return a verdict for defendants and entered the judgment in question.

Counsel for plaintiff here contend that the court erred in directing such verdict and in entering the judgment against plaintiff. We cannot agree with the contention, and think that the trial court's position as to the law upon the undisputed facts was the correct one. In 23 Corpus Juris, sec. 107, p. 357, it is said:

"The doctrine is well settled that property in the hands of sheriffs, constables, * *, etc., is regarded as being in custodia legis, and cannot be reached by execution, in the absence of statutory authority, the only difficulty experienced in the application of the doctrine being in determining the question as to when property is so within the custody of the law as to be included in the purview of the rule. The doctrine of 'in custodia legis' is a rule of property right, made for the benefit of litigants, as well as a rule of jurisdiction, made for the purpose of avoiding conflicts between courts, and it applies until the matters involved have been finally disposed of, and whether the execution issued out of the same or another court."

In the same article (sec. 108, p. 359) it is also said:

"Property taken under a writ of replevin from an officer who has seized it on execution remains in custodia legis and is not subject to execution." (Citing, among others, the cases of Hagan v. Lucas, 10 Peters (U.S.) 400, 404, and Rhines v. Phelps, 3 Gilm. 455, 464.) In 20 Ency. Law (1st ed.) p. 1075, it is said: "where the property has been taken by writ of replevin, it cannot be levied upon by judicial process." (Citing Goodheart v. Bowen, 2 Ill. App. 578, 580, and Hilliken v. Selye, 4 Hill (N. Y.) 623, 624). In Cobbey on Replevin (1st ed.) secs. 706 and 708, it is said:

"Property taken in replevin is in the custody of the law; whether in the hands of a party to the suit who has given bond, or held by the officer, is immaterial. On the giving of the bond the property is placed in the custody of the claimant. His custody is substituted for that of the sheriff. The property is not withdrawn from the custody of the law. * *

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IN THE COURT OF THE DISTRICT OF COLUMBIA

IN RE: THE ESTATE OF JAMES EARL RAY, JR., DECEASED

Case No. 1:68-cr-00001

Filed: 10/10/68

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While the replevin suit is pending, the property cannot be seized on execution or other process. * * Property replevied is in the custody of the law, and cannot again be levied on by the same sheriff holding a junior execution, or by any other officer holding an execution, and any such officer who makes such second levy does so in his own wrong and without authority of law. (Citing the two Illinois cases above mentioned and the case of Hagan v. Lucas, supra.)"

Counsel for plaintiff, in support of his contention, refer to certain holdings in Mahr v. Langan, 162 Mo. 474, 491-4. If it can be said that they support his contention and are applicable to the facts in the present case, we think it sufficient to say that they appear to be contrary to the Illinois decisions and to the general current of authority in other jurisdictions. (See, also, the cases of Hardy v. Keeler, 56 Ill. 132 and First National Bank v. Dunn, 97 N. Y. 149.)

Our conclusion is that the judgment appealed from should be affirmed and it is so ordered.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

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BEE KERINS,
Appellee,

v.

CITY OF CHICAGO,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

256 I.A. 610

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is sought by this appeal to reverse a judgment against the City of Chicago for \$1800, rendered after verdict in an action for damages for personal injuries received by plaintiff, by reason of a defective sidewalk, while she was walking south on the east side of South Campbell avenue, between Polk and Arthington streets, Chicago, on January 29, 1927, about 10 o'clock in the evening. Plaintiff has not filed a brief in this court.

The declaration consisted of four counts, to which the City filed a plea of the general issue. The fourth count was withdrawn. The first count alleged in substance that for a long time prior to the accident the City negligently permitted the sidewalk, on the east side of said avenue "north of the alley and between numbers 809 and 817 South Campbell avenue," to be and remain in a bad and dangerous condition, in that there was a hole or opening therein, 3 feet long, 18 inches wide and about 6 inches deep, and that plaintiff, while walking on the sidewalk and exercising due care for her own safety, stepped into the hole or opening and fell or was precipitated against "a certain manhole cover and material things there," whereby she was seriously and permanently injured. The second count charged negligence in permitting the

sidewalk to remain in such dangerous condition "without placing any lamp or light, guard rail or barrier, at said hole or opening to prevent travelers in the nighttime from walking or stepping into said hole." The third count charged negligence in permitting the sidewalk to remain in such dangerous condition and without having the street lamps in the vicinity lighted.

On the trial plaintiff testified as to the details of the accident, the extent of her injuries and the condition of the sidewalk at the time. Three occurrence witnesses corroborated her version, and four witnesses called by her testified that the sidewalk was out of repair and the hole in question dangerous to pedestrians, and that these conditions, known to persons living in the vicinity, had existed for more than six months. Plaintiff's evidence also showed that the lights in the block, which usually were burning at night, were not lighted on the evening in question. The City introduced evidence tending to show that the lights were burning at the time, and one of its witnesses testified in substance that the sidewalk at the particular place had been repaired and was in a reasonably safe condition. Plaintiff's evidence as to the injuries was not contradicted and the City does not here contend that the verdict and judgment are excessive.

The City contends that the verdict is manifestly against the weight of the evidence on the questions (1) whether plaintiff at the time was in the exercise of due care for her own safety; (2) whether the mere slipperiness of the sidewalk, occasioned by snow and slush thereon, did not cause plaintiff's fall and injuries rather than the hole, and (3) whether the sidewalk was reasonably safe for travel. After reviewing the evidence, as contained in the abstract, we do not think there is any merit in the contention or

contentions. On the contrary we think the verdict and judgment are fully warranted by the evidence. We deem it unnecessary to indulge in any detailed discussion of the testimony of the various witnesses.

The judgment is affirmed.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

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LORD C. H. E. ZEIGLER,
Appellant,

v.

WIELAND DAIRY COMPANY,
a corporation,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

256 I.A. 610²

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

In an action for damages for plaintiff's personal injuries, occasioned by the negligence of defendant's servant as claimed, there was a trial before a jury at which considerable evidence was introduced by both parties. The court gave to the jury 14 instructions of which 7 were offered by defendant. A verdict for defendant was returned and on May 4, 1929, judgment was entered against plaintiff and this appeal followed.

One of the grounds urged by plaintiff's counsel for a reversal is that the court erred in giving to the jury each of the following instructions offered by defendant:

"7. You are instructed that before the plaintiff can recover a verdict in this case he must prove the case as alleged in the declaration by a preponderance of the evidence.

10. The court instructs the jury that if the jury find from the evidence that the plaintiff, by any act of negligence, contributed in any degree to the happening of the accident in question, then the jury must find a verdict of not guilty.

11. The court instructs the jury that if you find from the evidence that both parties were guilty of negligence then the plaintiff cannot recover."

The first count of the declaration avers that on the day named defendant by its servant was operating and controlling a horse and wagon along a public alley in Chicago; that plaintiff exercising due care for his own safety was upon a ladder in the alley; and that defendant so negligently drove and operated the horse and wagon that the same ran into the ladder upon which plaintiff was standing,

causing him to fall to the ground, etc.

The second count alleges the physical facts with more particularity and avers in substance that plaintiff was the owner of the premises, known as 6114 Kenmore avenue, Chicago, on the rear of which was a garage abutting on a public alley, running in a northerly and southerly direction; that plaintiff had placed a ladder in the alley, leaning against the garage, and was lawfully standing upon the ladder and exercising due care for his own safety; that there was sufficient space in the alley for wagons and vehicles to pass by the ladder without coming in contact with it; that defendant by its servants was controlling the horse and wagon in the alley near where the ladder and plaintiff were; that defendant, not regarding its duty, "negligently permitted said horse to wander and proceed along said alley, while its servant in charge thereof was not keeping a proper lookout and guiding said horse;" and that as a result the wagon "struck the ladder, upon which plaintiff was standing, causing it to fall," and plaintiff was thrown to the ground and injured, etc.

The fourth count, after alleging the same physical facts, charged defendant with the negligent operation of the horse and wagon "without sounding any warning of the approach thereof."

The seventh count, after alleging the same physical facts charged that defendant "negligently and carelessly allowed said horse to wander and walk away without said servant attending to or watching the direction or course which the horse took, said servant being then engaged in other duties and not driving, and the reins being thrown over a hook at the top of the wagon."

Another count charged defendant with the negligent violation of an ordinance of the City of Chicago, making it an offense for any person to leave a horse, attached to any wagon or

other vehicle in any public way of the city, without securely fastening the horse. In two other counts defendant was charged with wilful and wanton negligence, but during the trial these counts were withdrawn from the jury's consideration. To all counts defendant had filed a plea of the general issue.

In view of the several charges of negligence as contained in the counts that went to the jury, we think that said instruction, No. 7, tended to mislead them. From its language they might have believed that it was essential, before plaintiff could recover, that he prove all charges of negligence as contained in all five counts, while under the law proof of the negligence charged in one good count would be sufficient to support a verdict for plaintiff. (Gruenendahl v. Consolidated Coal Co., 108 Ill. App. 644, 646-7; Harvey v. Chicago & Alton R. Co., 116 id. 507, 509.)

And we think that instructions Nos. 10 and 11 were erroneous and tended to mislead the jury, especially as plaintiff's evidence disclosed that all that he was doing at the time of the accident was standing on the ladder and assisting in the painting of the eaves of his own garage. The jury might have believed that plaintiff was guilty of some carelessness and also have believed that such carelessness was not the proximate cause of plaintiff's fall and injuries, yet in neither of these instructions, which directed a verdict for defendant, was this element of proximate cause mentioned. In holding that the giving of a somewhat similar instruction, which did not embody this element and which directed a verdict for the defendant, was error, our Supreme Court said in Consolidated Coal Co. v. Bokamp, 181 Ill. 9, 18: "It might be that plaintiff failed to do some act or was guilty of some careless or negligent act which contributed to his injury, yet which was not the

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charges in one case would be sufficient to support a verdict
 for plaintiff. (See Plaintiff v. Defendant, 100 Ill. App.
 2d, 628-71, 100 Ill. App. 2d, 628-71, 100 Ill. App. 2d, 628-71)
 and it is not necessary to say in each case

that the house was in the city, especially as plaintiff's
 evidence disclosed that all that he was doing at the time of the
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 plaintiff was guilty of some negligence and also have believed
 that such negligence was not the proximate cause of plaintiff's
 fall and injuries, but in neither of these instances, which

disclosed a verdict for defendant, was the element of negligence
 mentioned. In holding that the element of negligence was
 established, which did not require that element and which disclosed a
 verdict for the defendant, was error, and defendant shall be
 reinstated. (See Plaintiff v. Defendant, 100 Ill. App. 2d, 628-71, 100 Ill. App. 2d, 628-71)

plaintiff failed to do more than to show that he was negligent
 negligent and which constituted in his injury. It is not necessary that the

proximate cause of the injury, and still be entitled to recover."

We are of the opinion that because of the giving of these instructions the judgment appealed from should be reversed and the cause remanded. Inasmuch as another trial will probably be had, we have refrained from discussing the evidence in detail, although we have considered the same in connection with all given instructions.

REVERSED AND REMANDED.

Barnes, P. J., and Scanlan, J., concur.

...of the injury, and will be entitled to recover.

The fact of the injury being the cause of the loss of the instructions the defendant should be liable for the same. The fact of the injury being the cause of the loss of the instructions the defendant should be liable for the same. The fact of the injury being the cause of the loss of the instructions the defendant should be liable for the same.

THE DEFENDANT'S ANSWER.

By the defendant, J. J. Jones.

33557

JOSEPH LEITER, NANCY LATHROP CARVER
CAMPBELL, MARGUERITE HYDE SUFFOLK
and BERKS and DANIEL V. HARKIN, as
Trustees under the Last Will and
Testament of Levi Z. Leiter, Deceased,
Appellants,

v.

SIEGEL, COOPER & COMPANY, a
corporation, et al.,
Appellees.

APPEAL FROM

SUPERIOR COURT,
COOK COUNTY.

256 I.A. 610³

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The complainants, Joseph Leiter, Nancy Lathrop Carver Campbell, Marguerite Hyde Suffolk and Berks and Daniel V. Harkin, as Trustees under the Last Will and Testament of Levi Z. Leiter, deceased, filed their bill against Siegel, Cooper & Company, a corporation, et al., defendants. The master, to whom the case was referred, reported in favor of the defendants and recommended the dismissal of the bill. The chancellor overruled all exceptions filed by the complainants to the report and entered a decree dismissing the bill for want of equity. The complainants have appealed. In addition to Siegel, Cooper & Company, the defendants were Isaac R. Keim, one of the trustees of the estate of Pfaelzer, deceased, Abraham G. Becker, The National Bank of the Republic, The Central Trust Company of Illinois, Siegel Stores Corporation, and Seymour Morris, Joseph M. Otis and Abraham G. Becker, trustees under a certain voting trust agreement of January 31, 1914, between Siegel, Cooper & Company and The Central Trust Company of Illinois, and all of the known owners and the unknown owners of 1050 7 per cent convertible gold notes dated January 31, 1914, and the unknown owners of coupon notes belonging to said principal notes issued under said trust agreement.

The bill alleges (inter alia) the execution of a lease on March 6, 1908, between complainants and defendant Siegel, Cooper & Company, whereby complainants leased to said defendant certain premises in the loop section of Chicago (hereinafter described); that the said defendant occupied the same until about May 1, 1918; that said defendant, prior to May 1, 1918, became financially embarrassed and has ever since remained hopelessly insolvent; that it sold all of its assets and out of the proceeds paid moneys owing to creditors, but that it left debts unpaid, including the indebtedness to complainants, in excess of \$1,000,000, which are still unpaid, and that the corporation has in its possession moneys in excess of \$100,000 which complainants claim should be applied upon its indebtedness under the lease; that on January 31, 1914, Siegel, Cooper & Company executed its 1050 7 per cent 7 year convertible gold notes of that date, all payable February 1, 1921; that all of said notes were issued under a trust agreement dated January 31, 1914, between Siegel, Cooper & Company and The Central Trust Company, by which it was provided that the notes, including principal and interest, that might become due upon liquidation of the corporation, whether voluntary or involuntary, or upon any sale of its property, "should not be paid until all of the other indebtedness of the corporation then existing or thereafter accruing should have been paid in full, and that if the Company should become insolvent and unable to pay all its creditors in full, then payments of the notes issued under said agreement should be postponed to the payment of the Company's other indebtedness. But that the notes issued should be paid before the distribution of any part of the property or assets of the Company among its stockholders;" that there is now outstanding and unpaid of the notes an aggregate of \$923,000 of principal and interest thereon from January 31, 1916; that the owners of these notes claim to be entitled to the funds and property still held by Siegel, Cooper & Company, but that complainants charge that owing to

the provisions in said trust agreement the payment of said notes "must be postponed to complainants' indebtedness" of the corporation; that Abraham G. Becker, The National Bank of the Republic, The Central Trust Company of Illinois, complainants and certain other parties (named in the bill) are the owners of some of the outstanding notes and that the names of other owners are unknown to complainants; that about May 1, 1917, Siegel, Cooper & Company vacated and abandoned the demised premises and that there is now due the complainants under the terms of the lease, as of December 31, 1929, \$1,178,092.96, no part of which has been paid; that complainants have used their best efforts to rent the building since it was abandoned by said Company but that the largest amounts of money which complainants could realize have been, and complainants believe will for a long time continue to be, much less than the amount of rent reserved in the lease, and that the sum so due will, during the pendency of the suit, increase. The bill prays (inter alia) that an account may be taken of the indebtedness due to the complainants and the other creditors of Siegel, Cooper & Company, and that the receiver be decreed to pay to the complainants and the other creditors the amounts due them respectively.

The principal defendants, in their answers, aver (inter alia) that on May 1, 1918, Siegel, Cooper & Company surrendered the premises to the complainants, that the surrender was accepted by the latter and that the entire rentals due the complainants from Siegel, Cooper & Company had been paid.

The master found that about March 6, 1908, complainants entered into a written lease with Siegel, Cooper & Company, wherein and whereby complainants leased to said Company the eight-story and basement building situated on the east side of State street and extending from Van Buren street on the north to Congress street on the south, and from State street on the west to the alley next east of

[illegible]

State street on the east, and the boilers and light and power plant for the use of said building located in the basement of the building then known as 299 and 301 Wabash avenue, in Chicago; that the lease was for a period of twenty years from March 1, 1912; that the rental for the whole term was \$5,625,000, payable at the rate of \$250,000 per annum for the first five years of the term, \$275,000 per annum for the second five years, and \$300,000 per annum for the last ten years, all payable in monthly installments, on the last day of each month; that the lessee also agreed to pay all taxes which might be levied upon the premises during the term of the lease; that upon the execution of the lease Siegel, Cooper & Company took possession of the premises; that in 1914 said Company was in bad financial condition, and in January, 1914, it was indebted to the Leiter Estate for rent, and to the National Bank of the Republic, the Central Trust Company, Corn Exchange National Bank, the National City Bank and A. G. Becker & Company for various sums of money on account of loans theretofore made; that in order to improve the financial condition of Siegel, Cooper & Company an agreement was made, dated January 31, 1914, but which was actually entered into February 13, 1914, by and between Siegel Stores Corporation, a corporation, as party of the first part, and Seymour Morris, Joseph Otis and Abraham G. Becker, as trustees, as parties of the second part, in which agreement it was set forth that Siegel Stores Corporation was the owner of 3,500 shares of the capital stock of Siegel, Cooper & Company, consisting of 12,500 shares in all; that Siegel, Cooper & Company contemplated an issue of preferred stock that would be entitled to priority over the 12,500 shares; that said Company was in need of additional capital and had executed an agreement with the Central Trust Company, bearing the same date, providing for the issuance of \$1,000,000 of its notes, the rights of the holders of said notes to be subordinated to the other then present and future creditors

of the Company, and the holders of said notes being bound to convert the same into an issue of preferred stock; that by said agreement Siegel, Cooper & Company could not sell said notes unless a satisfactory management of the company was assured for a period of years, and for that purpose Siegel Stores Corporation agreed to assign 8,500 shares of said stock to said trustees under a voting trust agreement for a period and upon the terms mentioned in said contract; that said agreement further provided that the voting trustees might vote the stock, subject to the agreement, at all meetings of the corporation, special and general, upon any matters submitted to the meeting; that the action of a majority of said trustees, with or without a meeting, should constitute action of all the trustees; that said trustees were also given the power to vote in favor of an agreement creating preferred stock and were also authorized to adopt their own rules and methods of procedure, without notice to the holders of the stock trust certificates; that said trust was to terminate if and when all the notes, which had been issued at any time and outstanding under the noteholders' agreement, should have been paid in full in cash, if and when the holders of all the notes outstanding under the noteholders' agreement, and all the preferred stock, and trust certificates outstanding under said agreement, assented in writing to said termination; that in any event said trust was to terminate on February 1, 1924; that the trust agreement between Siegel, Cooper & Company and the Central Trust Company for the benefit of the noteholders was also dated January 31, 1914, but was actually entered into on February 13, 1914; that it provided for the issuance of convertible gold notes in the aggregate sum of \$1,000,000, in denominations of \$1,000 and \$500, all bearing even date with said agreement, payable on February 1, 1921, and bearing interest, etc.; that said trust agreement also contained the following:

"This note is issued and accepted upon the express condition exacted for the benefit of all other present and future creditors of the company, that the rights of the holders of the notes issued under said agreement are subordinated to the rights of all other present and future creditors of the company, to the extent and in the manner provided in said agreement. * * *

It is expressly understood and agreed, and all of said notes are issued and accepted upon the express condition (which agreement is made and which condition is exacted for the benefit of the holders of all the present and future indebtedness of the company other than that represented by the notes under this agreement) that the principal and interest of the notes issued under this agreement shall not be paid, either in whole or in part, upon the liquidation, dissolution or winding up of the Company, whether voluntary or involuntary, or upon any sale of the property of the Company under execution, or upon the administration of the property and affairs of the Company in receivership, bankruptcy, assignment or other like proceedings, until all of the other indebtedness of the Company then existing shall have been paid in full;"

that notes aggregating \$923,000 were issued under this agreement and were taken principally by the old creditors of Siegel, Cooper & Company; that the affairs of said Company did not improve and the notes issued under said agreement were past due; that the indebtedness to the Estate for rent, exclusive of the debenture notes then held by it, continued to increase until in February, 1916, when it amounted to about \$260,000; that the indebtedness to the banks for current loans amounted to \$775,000; that during this period numerous efforts were made to secure additional capital and to reorganize the business of said Company and that finally a meeting of the creditors of said Company and the representatives of the Estate was held, on February 1, 1916, which meeting was the result of several prior conferences; that it is contended on behalf of the complainants that at said meeting it was agreed that the bank creditors and the Estate were to subordinate their claims against Siegel, Cooper & Company to the claims of merchandise creditors; that the Estate agreed to subordinate \$140,774.52 of its accrued rent claim, which was the loss to Siegel, Cooper & Company for the year 1915, to the current loans of the banks; that the Estate agreed with the bank creditors to defer to the banks' current loans all rent over 3 per cent of the gross sales, plus taxes for one year, and it is further

contended by the Estate that by reason of said agreement it has a claim against Siegel, Cooper & Company for rent aggregating \$4,562,813.42; that on behalf of the defendants it is contended that at said meeting the written lease between Siegel, Cooper & Company and said Estate was terminated and was displaced by an oral agreement providing for the payment of 3 per cent of the gross sales plus taxes for a period of one year; that all indebtedness which accrued under said lease of 1908 and any other lease or leases that ever existed between said Estate and Siegel, Cooper & Company has been paid in full; that it is agreed between the parties that the total assets of Siegel, Cooper & Company now remaining are all in cash and approximate \$160,000 and that if the Estate's claim for rent is a valid claim and is to be preferred to the claim of the note-holders, the said cash goes to the Estate, and if the claim of the Estate is not valid or is not entitled to priority, said money goes to the noteholders.

The master further found that after February 1, 1916, Siegel, Cooper & Company continued to conduct its business until ^{about} May 1, 1918, during which period it paid to said Estate a sum equal to 3 per cent of the gross sales of said business; that the trustees of said Estate addressed a letter to the bank creditors, which letter was incorporated in the minutes of the meeting of the board of directors of Siegel, Cooper & Company held on April 22, 1916, and reads as follows:

Chicago, Ill., April 15, 1916.

To: National Bank of the Republic,
Central Trust Company,
Corn Exchange National Bank,
A. G. Becker & Co.

Gentlemen:

You are the holders of notes given by Siegel-Cooper & Co., amounting to \$775,000 par value, principal, which are among the preferred obligations of that company.

For the purpose of inducing you to agree to a continuance of the business of Siegel-Cooper & Co. in an effort to effect a reorganization thereof, you have consented to extend your notes from time to time up to and including the present time, and as

to the telephone.

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10. Estimated cost of the project, including the cost of the study, the cost of the design, the cost of the construction, and the cost of the operation and maintenance, shall be stated in detail.

such extension has been, in part at least, at the suggestion of the trustees under the Last Will and Testament of Levi Z. Leiter, deceased, the Trustees have heretofore verbally agreed with you that the amount of the loss sustained by Siegel-Cooper & Co. during the year ending February 1, 1916, amounting, as shown by the books, to \$140,774.52, should be treated in the following manner:

In case of the liquidation of the company by voluntary dissolution, bankruptcy, or otherwise, an amount equal to said sum of \$140,774.52 out of the indebtedness owing from Siegel, Cooper & Co. to the Trustees shall be subrogated to your notes for \$775,000, so that such assets in liquidation shall be applied first to the payment pro rata of your indebtedness, and the balance of the indebtedness to the Trustees in excess of the amount of \$140,774.52 and when your indebtedness and the balance of the Trustees' indebtedness shall have been paid in full, the assets shall next be applied to the payment of the said sum of \$140,774.52, and any remainder shall be applicable to the deferred debenture notes.

It is understood that both you and ourselves have agreed that the merchandise creditors shall first be paid in full out of the assets of the corporation.

This communication is addressed to you for the purpose of confirming the verbal understanding above set forth.

Very respectfully yours,

(Signed)

The Trustees under the Last Will
and Testament of Levi Z. Leiter,
deceased, by Joseph Leiter, Trustee";

that upon the expiration of the first year after February 1, 1916, there was no further agreement between the parties, but from February 1, 1917, until May 1, 1918, Siegel, Cooper & Company paid the Estate, from month to month, 3 per cent of the gross sales, plus the taxes; that in April, 1918, it was mutually agreed by the Estate, Siegel, Cooper & Company and its creditors that the business of Siegel, Cooper & Company should cease, and that its stock of goods be sold and its assets liquidated, and that thereupon the following agreement was entered into:

"Memorandum between Creditors and Parsons Interested in the liquidation of the business of Siegel, Cooper & Co., a corporation.

The undersigned who are creditors of Siegel, Cooper & Co., and the undersigned A. G. Becker, Joseph E. Otis and Seymour Morris, who as Trustees hold and control a majority of the stock of Siegel, Cooper & Co. hereby agree as follows:

1. All of the undersigned have selected H. J. Halle of Chicago, as liquidator, and agree that said Halle shall be placed in full control of the business of Siegel, Cooper & Co., with a view to liquidation of the said business, and disposing of the assets of said business in such manner as in the judgment

of said Halle would be for the best interests of all parties interested in said corporation as creditors or otherwise in the order of priority of their respective claims.

It is intended to vest said Halle with all the discretion which is vested in the Board of Directors and in the stockholders of said company so far as the directors and stockholders are controlled by the undersigned, and it is intended that said Halle shall have the right to employ any assistants, either those who are now in the employ of said Siegel, Cooper & Co., or any other persons whom he may deem advisable to employ for that purpose; that he shall be authorized to sell the assets of said Siegel, Cooper & Co., in bulk or by sales conducted on the premises, or in any other manner which he may deem advisable, and that each of the undersigned will by requesting the directors to vote or by voting as stockholders, take any action which may be necessary or proper in connection with the administration of the said corporation to enable the said Halle to perform any act which in his judgment is for the best interests of the corporation, and its creditors.

It is understood that the merchandise creditors, i.e., creditors who have sold merchandise to the said corporation in the regular course of business and whose claims consist of accounts current shown on the books of the corporation, shall be first paid in full, and that the proceeds of the liquidation of said business shall then be divided among the remaining creditors and the stockholders in the order of their legal priority, subject to any agreements which may have been heretofore entered in connection therewith binding upon the parties thereto, ^{at} any third parties.

It is understood that as to legal matters the said H. J. Halle shall be guided by the advice of Mayer, Meyer, Austrian & Platt, who are hereby designated by all the parties hereto as his legal advisers, but that in all matters of business policy the said Halle shall exercise his own best judgment and uncontrolled discretion.

It is understood that the compensation of said Halle and his attorneys shall be payable as a part of the expense of liquidation out of the proceeds of the liquidation of said business, and that all parties hereto will use their best efforts to procure said Siegel, Cooper & Co., a corporation, to enter into any contracts and take any action necessary or proper to perform any agreements or undertakings made by said Halle in connection with the proposed liquidation.

It is further understood that so far as reasonably may be any claim of any of the parties hereto which may arise in connection with said liquidation which may conflict with the interests of other parties hereto, will be adjusted by arbitration or otherwise with the view of where possible avoiding litigation; it being the intent and purport of this agreement that all matters connected with the liquidation of Siegel, Cooper & Co. shall be adjusted so far as possible without unnecessary delay and without loss or confusion arising from litigation between the parties hereto. Chicago, April 13, 1918."

The master further found that on May 1, 1918, the doors of Siegel, Cooper & Company were closed and its business ceased; that then said Company, by agreement with said Estate, paid rent at the rate of \$1,000 per day for a period of 15 days; that on May 1, 1918,

the stock of goods of said Company was sold to the Boston Store and the Estate agreed that the Boston Store could occupy the building for a period not later than May 31, 1918, at the same rent of \$1,000 per day; that a letter embodying the terms of said agreement was written by the Estate to the Boston Store, as follows:

"When Siegel, Cooper and Company turn over to you the possession of its store building on or about the 16th day of May, you will be permitted to occupy said building for as many days as you please up to but not beyond May 31, 1918, on payment to the Leiter Estate of the sum of \$1000.00 per day during the time you continue in such occupancy";

that the Boston Store occupied the building until May 23, 1918, when the stock of goods was moved out of the building and the building was vacated; that since that time Siegel, Cooper & Company has paid no further rent.

The master further found that the meeting of the creditors of said Company and said Estate held on February 1, 1916, was attended by various officers of the banks hereinbefore mentioned and by representatives of the Estate; that there is some conflict in the testimony as to what was said at this meeting about the then existing lease, whether it was to be canceled or remain in force; that there was a sincere desire on the part of all the witnesses to tell the truth, but that as the testimony was given some 10 years following the conference it was not clear as to many of the details; that the acts of the Estate subsequent to the conference, however, all indicate that the amount of the rental provided for in said original lease of March, 1908, was changed to an amount equivalent to 3 per cent of the gross sales of said Company; that one J. H. Bliss, Jr., was employed as an auditor by said Company by agreement with Joseph Leiter, one of the trustees of the Estate, and half of his salary was paid by the Estate; that Bliss prepared a balance sheet showing the condition of the business of said Company on December 31, 1916; that it shows among the liabilities the sum of \$233,610.23 due the Estate for deferred rent of the building; that said sum does not include any part of

The above is a copy of the original document as it appears in the original document. The original document is a letter from the Secretary of the Board of Directors of the United States Steel Corporation to the Board of Directors of the United States Steel Corporation, dated January 1, 1912, and is a copy of the original document as it appears in the original document.

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the present claim; that another item is the unpaid rental for the building that accrued prior to April 14, 1916, amounting to \$140,774.52; that said item was to be subordinated under the agreement hereinbefore mentioned, and is not included in the present claim made by the Estate; that there is also an item in said audit showing that there was due to holders of the 7 per cent convertible notes \$923,000, together with interest; that it clearly appears from the said report that the present claim of the Estate was not shown on the balance sheet; that reports of Bliss made in November, 1917, June, 1918, and November, 1918, do not contain the claim in question; that a report made by him on December 18, 1918, contains all the remaining liabilities of Siegel, Cooper & Company, but does not contain the claim in question; that all of said reports were submitted to Seymour Morris, one of the trustees of the Estate, and no objections were made to any of said reports; that a voucher check of Siegel, Cooper & Company, dated August 3, 1917, to the Estate for \$43,115.30 is itemized as follows:

| | | |
|------------------------------------------------|--------------|------------|
| *Rental 11 months ended December 31, 1916..... | \$136,230.37 | |
| Less rental payments: | | |
| 11 months ended December, 1916 | \$80,399.69 | |
| January, 1917 | 12,715.48 | |
| Paid February, 1917 | 50,000.00 | 143,115.17 |

(Amount of voucher check)

| | |
|----------------------------------------------------------------------|----------------|
| Balance due on rental for 11 months ended
December 31, 1916 | \$ 43,115.20;" |
|----------------------------------------------------------------------|----------------|

that on November 11, 1920, the Estate sent its statement to Siegel, Cooper & Company for a balance due for 1918 taxes as follows: "Balance general taxes account 1918 - \$8,110.74"; that a voucher dated November 11, 1920, for said sum, in favor of the Estate, was indorsed by the Estate "in full" for balance of said general taxes; that no taxes were charged or paid by Siegel, Cooper & Company after May 1, 1918; that the Estate took charge of the building after it was vacated by the Boston Store; that the Estate had several inquiries about it; that the following letter was received by the Estate from Feld &

Suydam, dated August 6, 1919:

"A client of ours has asked us to inquire if you would consider making a lease of your entire building situated on State Street formerly occupied by Siegel, Cooper & Company.

Will you kindly let us know the basis upon which you will consider making a lease for a long term of years? Our people are of the highest financial responsibility and will make a most suitable tenant.

Trusting we may have this information at your earliest convenience,";

that on August 9, 1919, the Estate replied as follows:

"We have your letter of August 6th. We quote for prompt acceptance on the building formerly occupied by Siegel, Cooper & Company and located at Van Buren, State and Congress Streets, Chicago, as follows:

On a five year lease \$350,000 per year net to us.

On a ten year lease \$350,000 per year for the first five years and \$400,000 per year for the second five years, these amounts being net to this Estate.

The tenant is to pay all taxes, insurance and operating expenses.

If your clients are interested, we will be glad to hear from you at an early date";

that on April 21, 1919, the Estate received the following letter from

J. L. Kesner:

"Dear Mr. Leiter:

I have in mind some responsible parties whom I think I could interest in renting your building formerly occupied by Siegel, Cooper & Company if the rental basis were reasonable.

Will you kindly give me the lowest rental on this building for ten, fifteen and twenty years.

Should you care to see me with reference to this matter, I would be glad to call on you if you will set the time and day";

that the following reply was sent to Kesner, on April 22, 1919:

"My dear Kesner:

We want \$350,000 net to us for the State Street Building. On this basis we would rent for five years, with an increase each period of five years of \$50,000.

Yours,

Joseph Leiter";

that another letter sent to Kesner is as follows:

"My dear Mr. Kesner:

I have yours of the 24th of April. We do not care to negotiate on any other basis than that indicated in my letter for rental of the State Street Building.

Yours very truly,

Joseph Leiter";

that Hart, Shaffner & Marx offered to lease the four upper floors of said building from the Estate for \$200,000 a year but the offer was not accepted; that none of said letters or offers was submitted to

Siegel, Cooper & Company, and none of the propositions of renting said building, as stated in said letters, was taken up with Siegel, Cooper & Company by the Estate, or by anyone in its behalf; that the agreement made on February 1, 1916, provided for the payment of 3 per cent of the gross sales plus taxes; that it did not merely change the amount of rent provided for in the original lease, but entirely changed the basis upon which future rent was to be calculated and paid; that the term under said agreement was for one year, whereas the term under the written lease was about 16 years; that on February 1, 1916, the term for which the 3 per cent of the gross sales would be paid was fixed at one year; that upon the expiration of said year on February 1, 1917, no agreement was made as to the future rental, but Siegel, Cooper & Company continued to pay and said Estate continued to accept 3 per cent of the gross sales from month to month; that when the Boston Store purchased the goods of Siegel, Cooper & Company on May 1, 1918, it agreed to pay \$1,000 per day from May 16th until such time as it would take to get the goods out of the building, and the letter of the Estate to it stated that the occupancy should not continue longer than May 31, 1918; that the Boston Store occupied the building for a period of seven days from May 16, 1918, to May 23, 1918, and paid therefor, to the Estate, the sum of \$7,000; that during May, 1918, while Halle was in control of Siegel, Cooper & Company as liquidator, under the agreement hereinbefore mentioned, he was given permission, for said Siegel, Cooper & Company, to continue to use the building in the sale or removal of the fixtures and that no charge was made for such use or occupancy.

The master concluded that the lease of March 6, 1908, was modified by the agreement made February 1, 1916, to accept rent at the rate of 3 per cent of the gross receipts and that said 3 per cent of said gross receipts was full payment for all rent accruing during

the period from February 1, 1916, to May 1, 1918; that on May 1, 1918, the lease was surrendered and that all rent due to the Estate from Siegel, Cooper & Company has been paid in full, and that the complainants have failed to prove the material allegations contained in the bill of complaint, and the master recommended that the bill be dismissed for want of equity.

The complainants contend that the contract of February 1, 1916, "was made solely between the Trustees of the estate of L. Z. Leiter, deceased, and the five banks, * * * These were the two controlling creditors. Neither the principal defendant, Siegel, Cooper & Company, nor the holders of the so-called Debenture Notes had any pecuniary interest in, or were in any way affected by the agreement. The Lessor and the Banks could adjust their claims between themselves as they chose;" that "this contract, * * * provided that as between the Banks and the Leiter Estate the Leiter Estate would accept 3% of the gross sales of Siegel-Cooper and not collect the entire rental provided for under the lease, until the Banks had been paid. This is a question of fact. Under this contention of the complainants, there would now be due to the Leiter Estate over \$220,000 which is greater than the money in the hands of Siegel-Cooper;" that "the sealed lease between the Trustees of the Leiter Estate and Siegel, Cooper and Company was not displaced * * * and was not even modified except as far as the Banks were concerned." The master found that there was an agreement made on February 1, 1916, between Siegel, Cooper & Company and the Leiter Estate which not only changed the amount of rent provided for in the original lease but also changed the basis upon which future rent was to be calculated and paid for one year; that by this agreement Siegel, Cooper & Company was to pay to the Leiter Estate as rent for the one year, 3 per cent of the gross sales of Siegel, Cooper & Company, plus taxes. The chancellor overruled the exceptions to these findings of the master. After a careful

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is a genuine organization or a front organization for the Government of the United States.

THE UNIVERSITY OF CHICAGO

1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

COOPER & CO., INC. NEW YORK CITY

1. The first part of the paper is devoted to the study of the properties of the function $f(x)$ defined by the equation

There is a large amount of material in the collection, and it is not possible to give a complete list of the contents. The collection is divided into several series, and the following is a list of the series and their contents:

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1. The first of these is the fact that the

There is no other person named [redacted] in the [redacted] area.

1944-1945

30 miles from the city of New York.

[illegible]

examination of all the facts and circumstances bearing upon the instant contention we are satisfied that the findings of the master were fully justified by the proof.

The complainants contend that they "are entitled to the difference between the rental provided for under the lease and 3 per cent of the gross sales for the period from February 1, 1917, to April 30, 1918, regardless whether the agreement of February 1, 1916, was with the Banks or with Siegel, Cooper and Company. For the purpose of argument, and not otherwise, we concede that the agreement of February 1, 1916, was between the Leiter Estate and Siegel, Cooper and Company, and absolutely modified the rental for a period of one year. There is no question that the agreement of February 1, 1916, was for one year, and no more;" ^{and} "the contract made the year before, as we have shown, and as is admitted, had come to an end. Immediately the rental clause in the lease of 1908, which had been dormant for a year, revived." While the master found that upon the expiration of the year, on February 1, 1917, "no further agreement was made between the parties," he also found that "Siegel, Cooper and Company continued to pay and said Leiter Estate continued to accept 3 per cent of the gross sales from month to month," and he concluded from the evidence "that said 3 per cent of said gross receipts was full payment for all rent accruing during the period from February 1, 1916, to May 1, 1918, and that on May 1, 1918, * * * all rent due to the Leiter Estate from Siegel, Cooper and Company has been paid in full." The chancellor overruled the exceptions of the complainants to these findings. We are satisfied that these findings of the master and the conclusion he drew from the evidence were fully justified by the proof. It is plain that on February 1, 1916, all parties concerned desired and agreed that the business of Siegel, Cooper & Company should continue - and it did continue, and in the premises in question. There was a difference of opinion as to how long the business should

be continued. Trustee Leiter had under consideration certain prospective permanent tenants for the premises and he was unwilling to agree to allow the business to continue there for another full year unless he had the right to terminate the agreement upon giving sixty or ninety days notice. While no express agreement was made between the complainants and Siegel, Cooper & Company upon the expiration of the one year period, it is perfectly clear that the business of the latter was continued there by agreement until May 1, 1918, when it was discontinued by mutual consent. The testimony of witnesses for both sides shows that "matters drifted along as they were," and the Estate continued to accept rent from Siegel, Cooper & Company on the 3 per cent basis, plus taxes. Trustee Leiter testified that "the thing drifted on and the attempts that we made to reach a definite agreement were reached by renewal of loans by the Banks and by our continuing to take 3 per cent for their rent." The rent and other vouchers given by Siegel, Cooper & Company to the Estate all support the theory that the rental was on the 3 per cent basis, plus taxes. The annual audits and reports of Siegel, Cooper & Company for the years 1917 and 1918, prepared by the auditor, also support this theory. Half of the auditor's salary was paid by the Leiter Estate and his reports were presented not only to the voting trustees of Siegel, Cooper & Company but to the Leiter Estate, and the latter appears to have made no objection to them. While the reports purport to state all of the liabilities of Siegel, Cooper & Company, they contain no mention or suggestion of the liability the complainants now assert existed, and the auditor testified that they contained all of the liabilities of Siegel, Cooper & Company of which he had any knowledge. So far as the record discloses the present claim of the complainants was first asserted in November, 1918.

In support of their instant contention the complainants

cite Hopedale v. Entwistle, 133 Mass. 443, and N. Y. Interurban Water Co. v. City of Mt. Vernon, 173 N. Y. S. 38, but neither of the so cases applies to the facts and circumstances of the present proceeding. That the minds of the parties met as to the basis of the rent for the year after February 1, 1917, is evident from the circumstances disclosed by the record, and from the acts and conduct of the parties a contract implied in fact arose. "A contract implied in fact is a true contract, the agreement of the parties being inferred from the circumstances, * * * An agreement in fact, creating an obligation, is implied or presumed from their acts, or, as it has been otherwise stated, where there are circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intent to contract." (13 C. J. 240-1.) The only difference between an express contract and an implied contract, in the proper sense, is, that in the former the parties arrive at an agreement by words, either verbal or written, while in the latter the agreement is arrived at by a consideration of their acts and conduct. (The People v. Dummer, 274 Ill. 637.) The further contention of the complainants that even if there was an agreement for the payment of a less sum than that called for in the lease, such agreement would be without consideration, and, therefore, not binding on the Estate, is without merit, as under all the facts and circumstances there was clearly sufficient consideration for such an agreement. Moreover, as the oral agreement was executed by both parties, the complainants are now in no position to raise, in this equitable proceeding, the instant point.

The complainants contend that the finding of the master that "on May 1, 1916, said lease was surrendered," was not justified under the evidence. We find no merit in this contention. Under the facts and circumstances, the master could have justly reached no other conclusion.

So far as the record is concerned, the first time that the present claim of the Leiter Estate was made was in November, 1918, six months after Siegel, Cooper & Company had turned the premises back to the Estate. At that time, to quote from the argument of the defendants, "the stock of goods of Siegel, Cooper & Company was sold, and the proceeds in cash were used during May to pay off creditors. And in May the deferred rent due prior to February 1, 1916, except the subordinated item of \$140,774.52, was paid in full, together with interest thereon. The deferred rent for 1916 had already been paid. And the banks and other creditors were paid in full in May. And on July 5, 1918, the Leiter estate was paid \$100,000 upon its deferred and subordinated claim for \$140,774.52 rent prior to February 1, 1916. We submit that it is absolutely inconceivable that the Leiter estate would not have mentioned further rent liability, if further rent liability had existed."

After a very careful consideration of the record we are satisfied that the decree of the Superior Court of Cook County is a just one and it should be and it is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

As far as the record is concerned, the first time that
the record claim of the United States was made was in 1913,
1913, six months after 1913, when the company was formed, the
provisions made in the State. I will state, in order to be
argument of the defendant, that there is no record of record, however
a company was made, and the provisions in such case were made for
to pay off creditors, and to pay the company, and the right to
February 1, 1913, under the provisions of the 1913, 1913,
was made in 1913, together with interest thereon. The company
went for 1913 and directly went paid. In the same way, when
provisions were made in 1913, and in July 1, 1913, the
United States was paid 1913, and the interest thereon was paid
claim for 1913, 1913, and interest thereon. In 1913, the
that it is somewhat inconsistent with the law, and the
not have recorded interest thereon, it would be made directly
and interest.

After a very careful examination of the record in the
relation that the record of the company was made in 1913,
a fact was made it should be made it is 1913.

1913.

Between 1913 and 1913, 1913, 1913.

33603

O. M. WHITE,
Appellee,

v.

MANDEL BROTHERS,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

256 I.A. 610⁴

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

O. M. White, plaintiff, sued Mandel Brothers, a corporation, defendant, to recover salary and commissions claimed for the year 1923, under a written contract for his employment as buyer and manager of defendant's furniture department. There was a trial before the court, with a jury, and a verdict was returned finding the issues against the defendant and assessing the plaintiff's damages at \$15,911.69. Judgment was entered on the verdict and this appeal followed. This is the second trial of the case. The first was tried by the court without a jury and at the close of plaintiff's case defendant's motion for a finding was allowed and a judgment was entered thereon for the plaintiff for \$192.28, an amount admitted by the defendant to be due the plaintiff on a semi-monthly salary from December 15 to December 21, 1923, when he was discharged. Plaintiff appealed from the judgment entered on the finding, and in White v. Mandel Brothers, 248 Ill. App. 313, we reversed the judgment and remanded the cause for a new trial.

The defendant has attempted to re-argue certain important questions which were decided by us on the former appeal. "When a case has once been determined by this court and its mandate has gone forth, what this court there held in determining the questions involved is the law in that case, until, if ever, the same is reversed

O. E. WHITE,
Appellant.

WILLIAM W. WHITE,
Respondent,
a corporation,
Defendant.

2261A.610

THE JUDICIAL COUNCIL OF THE DISTRICT OF COLUMBIA

O. E. White, Plaintiff, and William White, a corporation, Defendant, to recover salary and compensation due him for the year 1933, under a salary contract for his employment as mayor and manager of the District of Columbia, there was a trial before the court, with a jury, and a verdict was returned finding the issues against the defendant and awarding the plaintiff's demand of \$12,000.00. Judgment was entered on the verdict and this appeal followed. This is the second trial of the case. The first trial of the case without a jury and at the close of plaintiff's case defendant moved for a directed verdict and a judgment was entered against the plaintiff for \$12,000.00, an amount awarded by the defendant as he has the plaintiff on a contract which was entered into on January 11, 1933, when he was elected mayor. Plaintiff appealed from the judgment entered on the verdict, and is herein - renewed - his - appeal. The bill was amended to include the balance of the year for a new trial.

The defendant has attempted to introduce certain important questions which were asked by us on the former appeal. These case has once been determined by this court and the plaintiff has said, "Well, what else can be said in determining the questions involved in the law in that case, until it is over, the case is decided."

by the Supreme Court, and is binding on the parties, the circuit court, and this court." (Grisdley v. Wood, 220 Ill. App. 46, 47. See also Genslinger v. New Illinois Athletic Club, 252 Ill. App. 298.) Questions of law which have been decided by an appellate court on the appeal of a cause will not be again considered on a second appeal, and the decision on the appeal is binding not only on the trial court in the further progress of the cause but also on the appellate tribunal in any subsequent appeal. (People ex rel. Kastning v. Militzer, 301 Ill. 284.)

The defendant contends that "the court erred in permitting plaintiff to file a replication to defendant's affidavit of merits * * * that the gist of the issue raised by the replication sounded in tort and that the amount claimed exceeding \$8,000, the Municipal Court was without jurisdiction to try the issue so raised by the replication and should have sustained defendant's motion to strike the same from the files." There is no merit in this contention. The contract between the plaintiff and the defendant contained a provision that "the books of the Company shall be accepted as final and conclusive upon the question of the amounts due to said Employee," and the defendant, in its affidavit of merits, set up the contract and alleged "that it kept full, complete and accurate books of account relating to the business of its Department 24, covered by the contract involved in this case," and the plaintiff saw fit to file a replication to the affidavit of merits in which he charged, in effect, that the books were not honestly and fairly kept and that therefore the provision in question was not binding upon him. In our opinion the replication was entirely unnecessary. Without it, when the defendant, in the trial of the case, saw fit to introduce in evidence the books of the company, the plaintiff had the clear right to introduce evidence tending to show that the books were not honestly or fairly kept. If the proof showed that the books were not honestly

and fairly kept, the provision in question, of course, would not be binding. The argument that the filing of the replication changed the action from assumpsit to tort is without the slightest merit.

The defendant next contends that the court erred in denying its motion for a rule upon the plaintiff to file a bill of particulars "in support of replication by him filed * * *. It is fundamental that one alleging fraud must set forth clearly the facts which he claims constitute the fraud and wherein he has been deprived of some right by reason of the alleged fraud." The instant contention is based upon the first contention that the filing of the replication changed the action from assumpsit to tort, and we have already disposed of that contention. In any event, we are unable to see how it could be held that the court abused its discretion in refusing the bill of particulars, especially as the defendant had possession and control of the books and records which the plaintiff in his replication attacked. Moreover, we are satisfied from a careful examination of the record that the defendant's defense was not harmed or hindered in any way by the court's action.

The defendant contends that the court erred in admitting improper evidence offered on behalf of plaintiff and in sustaining an objection to proper evidence offered on behalf of defendant. We have carefully considered this contention and we find no substantial merit in it.

At the close of the plaintiff's evidence the defendant moved the court to instruct the jury to find the defendant ^{not} guilty. This motion was overruled, and the defendant now contends that the court's action in that regard was error. "Where a defendant makes a motion at the close of plaintiff's case for a directed verdict, if he desires to save his point, he must take no further part in the trial. If he does take such part and desires a directed verdict,

the court in passing on such motion must do so as of the time he makes such second motion and consider all of the evidence then introduced." (Cook v. Aeversmann, 244 Ill. App. 644.) The defendant did not stand by its motion for a directed verdict but proceeded to introduce testimony in its defense, and by this course it waived all objections to the action of the court in overruling its motion for a directed verdict at the close of plaintiff's evidence. (See Fowler v. C. & W. I. R. Co., 182 Ill. App. 123, 128, and cases cited.) Moreover, part of the plaintiff's claim was for unpaid salary, and the defendant in its affidavit of merits conceded that there was due the plaintiff for unpaid salary up to the date of his discharge, \$300. From what we have above stated as to the present contention, we do not wish to be understood as holding that the plaintiff did not make out a prima facie case as to the commissions alleged to be due him.

The defendant contends that "the court erred in denying defendant's motion at the close of all the evidence tendered on behalf of plaintiff and defendant for an instructed verdict against plaintiff on his claim for a bonus, as to both classes of sales, retail and contract." It is rather difficult to follow the defendant's argument in support of this contention. As we understand it, defendant argues that if the trial court, at the conclusion of the plaintiff's case, thought that the latter had made a prima facie showing that his discharge was not justified, still, at the conclusion of all the testimony the evidence was overwhelming that the defendant was justified in discharging the plaintiff and therefore the court should have instructed the jury, as a matter of law, that the plaintiff was justly discharged for cause; and it further argues that there was lack of any evidence of fraud on the part of the defendant in making the reductions complained of by the plaintiff, and therefore the court should have directed a verdict in favor of the defendant. In our former opinion we held that even if the plaintiff were properly dis-

charged for cause, that fact, alone, would not deprive him of the right to commissions up to the date of his discharge, if the evidence proved that he was entitled to any commissions. Moreover, the trial court had not the right, under the evidence in this case, to instruct the jury, as a matter of law, that the defendant was justified in discharging the plaintiff. It is clear that the plaintiff used improper and insulting language to his superiors which, standing alone, would have undoubtedly justified the defendant in discharging the plaintiff, but the latter claimed that the defendant, for the purpose of depriving him of commissions that rightfully belonged to him, provoked him into using the language in question for the purpose of giving the defendant an opportunity to discharge him, and there are, undoubtedly, circumstances in the case that support this theory of plaintiff, and therefore it was a question of fact for the jury to decide as to whether or not the discharge of the plaintiff was justified. (See Rosa v. Grand Pants Co., 156 S. W. 92; Wade v. Hefner, 84 S. E. 593; Borrance v. Hoopes, 96 Atl. 92; Lubriko Co. v. Eymann, 290 Fed. 12, 15-6.) Many other authorities might be cited to the effect that previous provocation by the master will sometimes render excusable words or behavior which, apart from that element, would constitute a good ground for dismissal. Nor can we agree with the somewhat labored argument of the defendant that the evidence overwhelmingly shows that the reductions made by the defendant were fairly and honestly made and that in view of that fact and the further fact that the proof overwhelmingly shows that the plaintiff was discharged for just cause, the court should have directed a verdict for the defendant. In its argument in support of this contention the defendant ignores facts and circumstances favorable to the plaintiff's theory. The plaintiff made out a prima facie case and therefore the trial court had no right to instruct the jury for the defendant.

(See Shannon v. Nightingale, 321 Ill. 168, 176.) As the defendant conceded that the plaintiff was entitled to a certain amount for unpaid salary, the court could not have instructed the jury to find the issues for the defendant. Aside from what we have stated, there are other good grounds why the trial court should have refused the two special instructions offered by the defendant with the general instruction to find for it. The defendant contends that "the court erred in giving improper instructions and in refusing proper instructions tendered in behalf of defendant." In this case the charge was delivered to the jury orally. "In such cases it is not expected that it will be entirely free from criticism in every particular. Where the jury are charged orally it consists of one continuous and connected charge, so that one part will always limit and qualify the other parts, and it is unfair to the court to pick out certain portions of the charge, omitting the other portions which limit and qualify the same, and then insist that the court committed error in its charge to the jury. (Greenburg v. Childs & Co., 242 Ill. 110.)" (Zeman v. North American Union, 263 Ill. 304, 313-4.) Rule 8 of the Municipal Court of Chicago requires that "objections to the giving or refusing of oral instructions to the jury must be specific and must be made immediately upon the conclusion of the charge and before the jury retire," and this rule is, of course, enforced in the appellate courts. (See Miller v. Lake View State Bank, 240 Ill. App. 395, 404; Interstate Finance Corp. v. Commercial Jewelry Co., 201 Ill. App. 568.) Rule 8 merely follows the rule enforced in all courts where oral instructions are given. The defendant made but three specific objections to the charge: (1) "The defendant objected to the instruction telling the jury that the plaintiff had a joint interest in the stock or a joint interest in the profits, or a joint interest of any kind in the stock or profits." (2) "The defendant objected to the instruction which, in effect, told the jury to take

into consideration the question of goading in relation to the remarks made by the plaintiff to the defendant, on the ground that it assumes there was evidence of goading and that there was no evidence in the record of goading." (3) "Defendant objected to the instruction, leaving it to the jury as to whether or not the defendant, Handel Brothers, acted in good faith in taking reductions as there was no evidence before the jury of bad faith." The defendant, in its argument, makes no point as to number 1. It contends that "it was the province of the court and not the jury to say whether or not the plaintiff's conduct was such that the defendant was justified as a matter of law, in discharging plaintiff. There was no conflict of evidence on the question of why plaintiff was discharged." As we have heretofore stated, we cannot agree with the contention that under all the facts and circumstances of the case, the court had the right to instruct the jury, as a matter of law, that the defendant was justified in discharging the plaintiff. The latter had been for a number of years a trusted employee of the defendant and his position was one of importance to the firm. On October 23, 1923, he had notified the defendant that he had elected to take advantage of the clause in the written contract of employment which provided that either party might cancel the contract by giving sixty days prior notice to the opposite party. To quote from our former opinion:

"Under the contract in question entered into November 7, 1921, he (plaintiff) took charge as buyer and manager of defendant's furniture department. In the performance of his duties he purchased the stock, arranged for its sale, fixed retail prices, made the reductions thereon in the course of the year or at inventory periods, and had been unrestricted in the exercise of the duty of making reductions from the year 1917. The reductions he made kept in view his duty to maintain a gross profit of 33 1/3 per cent on net retail sales for the firm, and during the year 1923 reductions were made by him in the usual course when necessary for the purpose of selling, he going over the stock for further reductions in December, 1923, preparatory to the inventory at the end of the year. Apparently

contrary to former practice of the firm his superiors on December 20, 1923, sought to make further reduction of prices that plaintiff thought was uncalled for and unjustifiable and that would have a tendency to deprive him of commissions he had earned during the year."

That we there said applies with equal force to the present record. It was plaintiff's theory of fact that when he exercised his right to terminate the contract, the defendant determined to deprive him of approximately \$12,000 that was due him under his contract, by unjustifiable reduction of prices, and that the discharge was part of the scheme to defraud him. There are facts and circumstances in the case that support this theory and, therefore, whether or not the defendant was justified in discharging the plaintiff and whether or not there were commissions due the plaintiff, were questions of fact for the jury to decide.

The following is a part of the long oral charge of the court: "The next item is the matter of the claim for commission on contract sales. Now, let's see: I think it is conceded he is entitled to a commission on contract sales, but the amount is in doubt. Mr. Cook: Well - The Court: The amount is contented, is that correct? Mr. Manion: No there is no contention at all on the part of the defendant that the commission per cent maintained in the contract sales was not maintained for the year; and it would simply be a matter of computation whether it would be for one year or until December 21st, on the contract sales. The Court: It is conceded that Mr. White is entitled to a commission as provided in the contract of 1 per cent of the net contract sales in excess of \$150,000. You have heard the evidence as to the amount; and you will determine whether he is entitled to a commission on the net contract sales up to December 21st or December 31st, depending on whether he was rightfully or wrongfully discharged. If he was rightfully discharged he can only recover to the 21st of December; if he was

factory to have been of the type which was
described in 1913, and to have been
given that description was made by the
and that would have a tendency to deprive him of his
he was asked during the year.

That he had said nothing about the fact that
it was Plaintiff's theory that the fact that he was
to terminate the contract, the witness admitted to deprive him

of approximately \$12,000 and the witness admitted, by
unjustified reduction of price, and that the witness was not

of the scheme to defraud him. There are facts and circumstances

in the case that support this theory and, therefore, should be not

the defendant was justified in disbelieving the Plaintiff and should

or not there were conditions and the Plaintiff, with possession of

fact for the jury to decide.

The following is a part of the long oral charge of the

court: "The next issue in the matter of the claim for commission on

contract sales. Now, fact is that it is contended by the

defendant that a commission on contract sales, but the record is to

show. Mr. Cook: Well - The Court: The record is contended, is

that correct? Mr. Plaintiff: He there is no commission at all to the

part of the defendant that the commission was not retained in

the contract sales and not retained for the year and he would

slightly be a matter of fact that when he said it would be for one year

on until December 31st, on the contract sales. The Court: Is he

conceded that Mr. Cook is entitled to a commission on contract sales

the contract of I get word of the fact that he is entitled to

\$120,000. The Court: Now, the witness of the fact that he is entitled

to determine whether he is entitled to a commission on the fact that

sales up to December 31st or January 1st, depending on whether

he was entitled to a commission on sales. It is not material

whether he was only entitled to the fact of December 31st or

wrongfully discharged, he can recover to the 31st of December."

The defendant now seeks to argue that this portion of the charge was erroneous. This it cannot do, for two reasons, first, it made no specific objection to this portion of the charge, and, second, it appears that it acquiesced in the correctness of this part of the charge. In an effort to avoid the effect of Rule 8, counsel states that "the wording of the instruction was not caught by the attorney for the defendant and was not noticed until after the record had been written." Such a lame excuse, of course, cannot be considered. The counsel was satisfied with the portion of the charge in question at the time it was delivered and he will not now be heard to say that it was erroneous. Moreover, the defendant's argument that the said portion of the charge is erroneous, is based upon the contention that the court's decision on the former appeal of this case was erroneous.

The defendant contends that the court erred in refusing to give the following instruction tendered by it after the jury had retired to consider their verdict:

"If you believe from the evidence that the plaintiff, while in the employ of the defendant, or in the presence of his superiors and in the presence of others of his fellow-employees, made substantially the following statements concerning the defendant corporation: 'They are nothing but a bunch of crooks, trying to beat me out of my bonus, and if any of you people have any contracts with Mandel Brothers where you get a bonus at the end of the year, you better get it in your salaries as they will beat you out of your bonus,' then you are instructed that such conduct on the part of the plaintiff constituted good cause for discharge within the meaning of the contract of employment, if from the evidence you believe the plaintiff did make such remarks in the presence of his superior officers and in the presence of other fellow employees."

The contention of the defendant is without merit, as this instruction ignores facts and circumstances in the case bearing upon the question as to whether or not the plaintiff was rightfully discharged.

The defendant contends that "the argument of the counsel for plaintiff to the jury was prejudicial and inflammatory." Con-

tentions of this kind are becoming very common. In the recent case of Lamar v. Gelling, 252 Ill. App. 233 (certiorari denied by the Supreme Court), in passing upon a question as to whether or not the jury was improperly influenced by a certain act of the plaintiff in that case we said: "In this enlightened country and under our system of universal education, juries must be presumed to possess reason and judgment." We adhere to that statement. The only assignment of error in reference to the argument of the attorney for the plaintiff is that "the court erred in permitting counsel for appellee to make improper arguments to the jury over the objections of appellant." The record shows that the court not only sustained the objections of the defendant to remarks of counsel for the plaintiff that it now complains of, but that the court made his ruling in such a manner as to remove any possible harm that could have come to the defendant from the statements of counsel. During the argument of the counsel for the plaintiff the following occurred: "Is there any other evidence that he was goaded into it? It now appears from Plaintiff's Exhibit 3, which is the letter of discharge which you will take with you to the jury room, that on the day following this occurrence, this regrettable occurrence, he gets a letter and the testimony is it is signed Edwin Mandel but the initials on here are 'B.J.A.', a lawyer for Mandel Brothers. In other words they goaded White into saying what he did and immediately they dash up into their lawyer's office - in other words a lawyer has built up this case from the start. Mr. Manion (counsel for defendant): Just a minute. There is no evidence in this record that any such inference of any such character could be drawn and I object to counsel making any such argument and he knows and the court knows that there isn't a word of truth in that. The Court: Objection sustained. Mr. Cook: If the court please, the plaintiff testified that the initials B.J.A. are Benjamin J. Altheimer and it stands undisputed

in this record. The Court: That is true but I don't think your inference was exactly justified about the whole case. Mr. Cook: It isn't even an inference, it is a lawyer's letter. The Court: But you said that the whole case was built on a lawyer's counsel. Mr. Cook: I would say they started right out, here is the foundation stone, a letter written by a lawyer. The Court: Objection sustained." The defendant complains of the italicized portion of the argument. The plaintiff contended that the discharge was part of a scheme to defraud him of the commissions that he had earned, and undoubtedly counsel had the right to comment on the fact that the defendant had its attorney draft the letter of discharge, and plaintiff strenuously argues that the statement in question was a reasonable inference from the facts and circumstances in evidence, and that the trial court erred in sustaining the objection of the defendant and in stating, in the presence of the jury, that the argument was not a reasonable inference from the evidence; but even if it were not, the court not only sustained the objection to the statement, but gave his reasons for his action in such a way that the jury could not have been improperly prejudiced by the statement. We may add that the statement of the attorney for the defendant in making his objection that "he (plaintiff's counsel) knows and the court knows that there isn't a word of truth in that," was improper.

We have now considered the various contentions of the defendant and we are satisfied, after a careful examination of the record, that the defendant has had a fair trial, and the judgment of the Municipal Court of Chicago will be affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

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LENA BENKE,
Appellee,

v.

PETER HEUSCHEL,
GUSTAVE WEILAND and
FRED WIEGERT,
Appellants.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

256 I.A. 611¹

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Lena Benke filed her bill in the Circuit Court of Cook County against Peter Heuschel, Gustave Weiland and Fred Wiegert. From a decree entered in her favor defendants have appealed.

The complainant is the owner of the premises described as 605, 607 and 609 Diversy parkway, located on the south side of Diversy parkway, about 175 feet east of the intersection of Clark street, Diversy parkway and Broadway. The premises are improved with a building that occupies practically the entire lot area with the exception of a space described as an arway or yard, in the rear of the building approximately eighteen by thirty feet in size. The building is L-shaped, four stories high, and is used as an apartment hotel. It contains three stores on the ground floor, fronting on Diversy parkway. The complainant and the defendants entered into a written lease October 28, 1925, whereby the complainant leased to the defendants the "premises known and described as the store known as 608 Diversy parkway," to be used for a restaurant and for no other purpose. The lease expires November 30, 1940, and the total rental is \$108,000, payable in monthly installments varying from \$500 to \$700 a month. The bill alleged that the only premises leased to the defendants "was the inside of said store," and "that without the consent of the

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1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

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Page 10

10-11-1941

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the following information is to be used for the purpose of the investigation.

1948

SECRET

REF ID: A68709

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

CONFIDENTIAL - SECURITY INFORMATION

THE UNIVERSITY OF CHICAGO

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complainant the defendants erected two shacks adjoining the exterior wall of said building projecting into the rear areaway of complainant's lot in a westerly direction, and from the southerly lot line to the southerly building line of complainant's building, making the rear of said premises unsightly and unsanitary, and wrongfully depriving the complainant of the use of said premises;" that one of the shacks is approximately six to seven feet deep by twenty feet long; that the other shack is frame and is built on to the first shack, and is unsightly and unsanitary; that the defendants pile up their garbage, debris, waste matter, etc.; that smells emanate from the garbage and contaminate the atmosphere and disturb the peaceful occupancy of the rest of the premises, causing great losses in rents to the complainant and endangering the health of other occupants of the building; that the lease provides that the defendants are to keep the premises and appurtenances in a clean and sanitary condition and comply with the ordinances of the city of Chicago, and remove all garbage and litter incidental to the restaurant business, and that they "shall not place or cause to be placed on said yard, any temporary obstructions of any kind." The complainant prayed that upon a final hearing she be awarded a mandatory injunction whereby the defendants should be directed to remove the shacks in question and to restore the premises to the same condition as they were in before such shacks were erected. In their answer the defendants averred that they had the right to the use of the yard or areaway under the lease; that the areaway was used by all tenants for the delivery of merchandise and also as a place to keep their garbage, sweepings and other debris; that the areaway has been so used by the complainant and all of the tenants since December 1, 1925, and that the complainant has had full knowledge of such use and has at no time made any objection to such use; that the defendants have caused their garbage to be removed once each day and that there has been no change

in the manner of handling the garbage during the past three years; that there has been no accumulation of litter, refuse or garbage at any time and that there has been no stench or obnoxious smells emanating from said garbage, and that the areaway has been kept in a clean and sanitary condition. The defendants deny that the lease contemplated that they had the right to the use of only the inside of the store, and they declare that the demise included the right to use the areaway as a means of ingress and egress to and from the restaurant, for the purpose of delivering and receiving articles and removing garbage, and as a place to keep the garbage cans of the defendants and for all other purposes incident to the restaurant business. The defendants deny that they erected the sheds without the consent of the complainant and they aver that the sheds are airtight and covered with metal and were made to keep the garbage cans therein, temporarily; that complainant knew of the erection of the sheds, that they have been there for three years and that complainant made no objection at any time to the presence or use of the same. The defendants further aver that at a recent conference with the complainant she said that she had no objection to the presence or use of the sheds or the manner in which the garbage was being handled by the defendants, that she was not suffering any damage from the way the garbage was being handled, but that she desired to leave Chicago and asked defendants to take over the handling of her hotel property, and that the defendants refused this request; that complainant offered to withdraw all objection to the use of the areaway if the defendants would pay \$200 additional rent per month; that the premises have been often examined by the health department of the city of Chicago and "found to be in a healthy and sanitary condition." The defendants deny that the complainant has lost any tenants or rents by reason of the presence of the sheds in the areaway or the manner in which the garbage is handled, or that she has suffered any damage therefrom

[illegible]

whatsoever. They aver that they keep the place clean and neat and remove the garbage daily, and deny that there is any danger of a breach of the peace or that the complainant has not an adequate remedy at law, and deny that the complainant is entitled to a mandatory injunction, as prayed, and aver that complainant is guilty of laches.

The case was referred to a master, who made his findings and recommendations, and the chancellor thereafter entered a decree finding the equities with the complainant and permanently enjoining the defendants from keeping or storing garbage cans and garbage in said areaway or yard at any time, and from erecting or attempting to erect any buildings or obstructions, sheds or shacks in or upon said areaway and ordering them to "forthwith remove and take down said sheds or shacks, and restore said areaway and premises to the same condition as the said areaway and premises were prior to the time that the defendants erected said sheds or shacks, and that said sheds or shacks be removed within not more than thirty days from the date of this decree."

The defendants have argued a number of contentions and in our judgment there is much force in several of these, but in the view that we have taken of this appeal it will be necessary to refer to only one. The defendants contend that the complainant is clearly guilty of laches and is, therefore, not entitled to the relief she seeks. This contention is a meritorious one. The sheds in question were erected by the defendants in January, 1926, and the bill of complaint was not filed until March 5, 1929. There was no basement to the premises occupied by the defendants, and the defendant Peter Heuchel testified that at the time of the making of the lease he stated to the complainant that as there was no basement to the premises they would need space in the areaway in which to place their garbage cans, that this would be essential to the conduct

that never, in any case, did it say that there is no danger
and remove the danger daily, and that there is no danger
of a breach of the peace or that the complaint was not
admitted timely at law, and only that the complaint is not
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guilty of breach.

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of their restaurant business; that at first they placed their garbage cans out at night and the garbage was hauled away each day; that a week after they opened the place he told the complainant that he would like to build a shed in order to keep the garbage cans under cover and that the complainant said that it would be a big improvement to have the garbage cans under cover; that he then (January, 1926) ordered a carpenter to put up the sheds; that when they were constructed he asked the complainant what she thought of them and she said it was a wonderful improvement and that the garbage cans would be out of sight and that she was satisfied with it that way. The witness testified that they had been using the sheds for that purpose ever since they were constructed and that the complainant, who lived in the building, saw them constantly and that she never complained about them "until now," and that she has always used their garbage cans in the sheds for her garbage, and that the hotel "always threw their garbage into our cans." The defendant Fred Wiegert testified that they had been using the sheds continuously since January, 1926, and that the complainant had never made any objection to the use that they were making of them. The complainant denied that she gave the defendants permission to build the sheds and stated that she was in California at the time they were erected. She admitted that she saw them there when she returned to Chicago, in May, 1926, and that she had seen them constantly since and knew that the defendants were always using the sheds for the purpose of placing the garbage cans therein. Her testimony regarding alleged complaints to the defendants is not of a very satisfactory kind. She testified that when she came back from California she went to Peter Heuchel and said to him: "'Now, you know there has been an awful complaint about this garbage, and this stuff has to be taken away, and you have to take care of it,' and he said he would. He wanted to build a store so that it goes all the way across, and the

of their respective business; that at first they signed their
names and was at night and the business was signed and was
day; that a week after they opened the place he sold the business
and that he would like to build a road in order to keep the business
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big improvement to have the bridge over water over the road he was
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garbage cans wouldn't show, and he wanted to rent that from me and I had been waiting for him to hear from him. * * * I wanted him to take that stuff away and the health department came in to see me and I wanted to come to some kind of understanding between us. I didn't want to be mean to them." She further testified that on August or September, 1928, Peter Heuchel said to her that he would like her to allow them to put a garbage burner in the yard to take care of the garbage and that they would pay her for the space. "They spoke about the yard because they wanted to build an extra building and they had a man around there figuring how much it was going to cost. Then they said they would come over to see me and we would go ahead and make arrangements with Mrs. Strausheim and draw up the agreement between us, and the day before they were to build, Fred (Wiegert) came in and he says: 'I am letting you know now that we don't want this room, but we are going to build a one-story building in the back of this restaurant in the yard.' I says: 'You can't do that.' He says, 'Why, what is the matter. You don't need the space and I need the space.' And I says, 'Well, you have to pay me something for it, and we will have to come to some kind of understanding,' and he said, 'I will see you later.' I says, 'Don't you build anything until you see me,' and he said, 'Well, I have to call up the man in the morning and let him know not to come, because we already ordered the man, not to come back.' I says, 'That is fine. You tell me what to do with my property, build on my property without paying me anything.' They asked me how much I wanted for that back in there, and we were figuring on how much the basement was worth at the time. The basement was additional. I was not speaking of that. They were figuring on how much it would cost to put in the garbage burner and we were going to figure this all out between us, and we were going to adjust it so that there wouldn't be no wrong to them, by helping them. I was waiting

Garage man couldn't show, and he wanted to wait for him. I wanted
 and I had been waiting for him for some time. I wanted
 him to take that suit away and the suit was taken away from
 me and I wanted to come to some kind of understanding between
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 would like to see him to get a garage man in the house to
 take care of the garage and I would like to see the man.
 They spoke about the yard because they wanted to build an office
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 we would go ahead and make arrangements with the firm and
 draw up the agreement between us, and the day before they came to
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 story building in the back of this house in the yard.' I said
 'You can't do that.' He says, 'Why, what is the matter. You can't
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 to pay me something for it, and we will have to come to some kind of
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 that been in there, and as soon as lighting was put in the house
 was worth of the time. The payment was \$100.00. I was not
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 and before we, and we were going to adjust it so that there
 wouldn't be no more to them, by building them. I was building

for them to come in and have some understanding. * * * I had objection to their using the yard under the condition it has been, the way everything has been going on. I don't want the garbage cans there. * * * I told them to take that stuff away. To take care of that garbage. * * * I told them to move everything out of the yard. By that I meant the sheds, garbage and everything else. I did not specify the sheds but I meant the sheds, too." The witness further testified that when she got back from California, in May, 1926, she told the defendants to remove "that stuff and they didn't even listen" to her; that "they got peeved about it," and she told them that if they did not remove "that," she was going to court, and they told her to go as far as she liked, that it was their yard. As we read the record there is much force in the contention of the defendants that they erected the sheds by permission of the complainant, but, in any event, the complainant for three years saw the sheds daily and knew the use to which they were put. In fact, she did not directly deny the testimony of the defendants that she herself used the garbage cans of the defendants in the sheds for the purpose of placing her garbage therein. She admitted that in August or September, 1928, she discussed with the defendants the question of allowing them to make further use of the arway or yard and that she told them that they would have to pay her something for it if they did, and we think there is considerable merit in the contention of the defendants that the present proceeding was the result of their refusal to pay her the additional rent she demanded for the use of the arway. In fact, the counsel for the complainant, during the hearing, stated: "The trouble with these fellows is they want the space, but don't want to pay for it." The complainant testified: "I like the way they kept the restaurant," and "I don't say that they were not good tenants;" and while at times, in her testimony,

she endeavored to create an impression that she had trouble with the defendants about the sheds, nevertheless, it is hard to reconcile that evidence with certain admitted facts and circumstances in the case. The complainant failed to call a single witness to sustain her contention that the sheds and garbage cans therein were offensive. The defendants voluntarily built the sheds for the purpose of eliminating odors from the garbage and they were covered with sheet iron and were made as air-tight as possible. The complainant admits that other tenants placed garbage in the arcaway. The proof shows that the complainant and the hotel used the garbage cans in the sheds for the purpose of disposing of their garbage. The complainant rented the premises to the defendants for restaurant purposes and she knew that garbage was an incident of that business. It is not disputed that she was anxious to get the defendants as tenants and that she promised to help them in their restaurant business if they would become her tenants. As to the size of their business, the complainant testified that twenty waitresses and about fifty men worked in the restaurant. That the complainant was guilty of laches, under all the facts and circumstances of this case, seems to us clear. Counsel for the complainant endeavors to escape the effect of her laches by arguing that she "continuously objected to the sheds and garbage cans of the defendants" and that she "consistently exercised her greatest efforts in an attempt to procure the removal of these obstructions and at no time gave her consent to their being on her land," but this argument, in our judgment, does not accord with the facts and circumstances of the case. According to her own testimony, she told the defendants, in May, 1926, that she would go to court, "go to law," if they did not remove the sheds, and they told her to go as far as she liked. Moreover, mere requests to remove the sheds, alone, unaccompanied by any act to give effect to the requests, will not bar laches. (See Kerfoot v. Billings, 160 Ill. 563, 574.)

[illegible]

The master made no finding that the defendants threatened to erect or attempted to erect any buildings or obstructions, sheds or shacks in or upon the areaway, and he merely recommended "that a mandatory injunction issue forthwith directing the defendants to remove said two sheds or shacks from said areaway or yard, and that the defendants be permanently enjoined from keeping or storing garbage cans and garbage in said areaway or yard." The decree also enjoined the defendants "from erecting or attempting to erect any buildings or obstructions, sheds or shacks in or upon said areaway." There is no evidence to warrant this part of the decree. After a careful consideration of the evidence we have reached the conclusion that the complainant is not entitled to the relief granted her in the decree. If she is entitled to additional rent from the defendants for the use of the space in the areaway, or if the defendants are mere trespassers, as she alleges in her bill, the law affords her ample remedy.

The decree of the Circuit Court of Cook County is reversed and the cause is remanded with directions to the chancellor to dismiss the bill of the complainant ^{for} want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

Barnes, P. J., and Gridley, J., concur.

33725

85a
ROBERT BRANCH et al.,
Appellees,

v.

ISAAC A. THOMAS et al.,
Appellants.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

256 I.A. 611³

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Robert Branch et al., complainants, filed their bill in the Circuit Court of Cook County, against Isaac A. Thomas et al., defendants. A decree was entered, from which defendants have appealed.

Complainants are members of the Second Baptist Church of Evanston and the bill sought to restrain defendants from interfering with the functioning of the church in accordance with its established rules and regulations, usages and customs; from denying any of the members of the church access to the church for the purpose of holding meetings therein and from enjoying the privileges thereof; from in any manner exercising or attempting to exercise the duties and functions of the officers of the church; from in any manner interfering with the collections or contributions of the members of the church, and from obtaining or disposing of any properties and choses in action of the church; from performing or attempting to perform any act calculated to continue defendant Thomas as pastor of the church contrary to the will of the majority of the membership of the church; from hindering complainants or any other members of the church from enjoying the rights and privileges of membership in the church, and from hindering certain of complainants from exercising their duties and functions as officers of the church.

1275

REPORT MADE BY THE
COMMISSIONER

7.

STATE OF TEXAS,
COUNTY OF DALLAS.

3001 A. 511

WE, THE JURY, FIND THAT THE DEED IS VALID.

Robert Smith of the County of Dallas, Texas, do hereby certify that the

is the official record of the County of Dallas, Texas, and that the same is
correctly and truly transcribed from the original record as the same appears
in the office of the County Clerk of the County of Dallas, Texas.

Witness my hand and the seal of the County of Dallas, Texas, this 1st day of

of January and the day of the month of January, 1901.

In testimony whereof, I have hereunto set my hand and the seal of the County of Dallas, Texas,

this 1st day of January, 1901.

Given under my hand and the seal of the County of Dallas, Texas, this 1st day of

January, 1901.

Robert Smith, County Clerk of the County of Dallas, Texas.

Attest: My hand and the seal of the County of Dallas, Texas, this 1st day of

January, 1901.

Attest: My hand and the seal of the County of Dallas, Texas, this 1st day of

January, 1901.

Attest: My hand and the seal of the County of Dallas, Texas, this 1st day of

January, 1901.

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January, 1901.

Attest: My hand and the seal of the County of Dallas, Texas, this 1st day of

January, 1901.

Demurrers were filed to the bill, but no action was taken in reference to the same.

On June 15, 1929, Judge Fisher entered a consent order appointing a special commissioner and directing him to conduct "an election by the members of the Second Baptist Church of Evanston, Illinois, for the offices of members of the Board of Trustees, Board of Deacons, Clerk and Treasurer and shall also cause to be determined whether or not Isaac A. Thomas shall continue to occupy the post of Pastor of said Church." The commissioner set the election for July 15, 1929, but on July 14 he posted a notice that the election would be held on July 19, 1929. On July 16 defendants filed with the clerk of the court a notice and affidavit to the effect that the time limit for holding the election, under the agreed order of June 15, expired on July 15, that the commissioner was without power to hold an election on July 19, and "that the power of said commissioner to give said notice or to hold said election is exhausted; that the duty of the commissioner is to report at once," and that the solicitor for defendants, after receiving by mail, on July 19, "a suggestion from said commissioner that the date of the proposed election would be Friday, July 19, 1929," had immediately delivered to the commissioner a letter calling his attention to the fact that the change in the date of the election would be contrary to the agreed order. On the last date an election was held. The commissioner drafted a report. Defendants filed objections to the same, which were overruled by the commissioner. In the meantime the cause had been placed on the regular calendar of a chancellor, other than Judge Fisher. Late in the afternoon of August 3, 1929, solicitors for complainants notified solicitors for defendants that on the following morning they would appear before Judge Fisher and submit the report of the commissioner and move that the same be filed and approved, and would also move the court to enter an injunction in accordance with the prayer of the

bill, and would further move the court to enter an order upon defendants requiring them to account for all or any properties or moneys in their hands or under their control belonging to the said church. Thereupon solicitors for defendants immediately served a notice upon solicitors for complainants that they would, on August 9, 1929, present a petition for a change of venue from Judge Fisher. When court convened on August 9, this petition was presented to said Judge. It alleged prejudice of Judge Fisher and also alleged that it appeared from the report of the special commissioner that Judge Fisher was a material witness in the case. That the petition, on its face, complied with the requirements of the statute, is not disputed. At the time it was presented the report of the commissioner had not been passed upon by the chancellor - in fact, it had not even been filed or presented to the chancellor. The chancellor denied the petition and, over the strenuous objections of defendants, proceeded to hear the cause upon the bill of complaint, as amended, and upon the report of the special commissioner, and then entered the decree from which defendants have appealed.

Defendants contend (inter alia) that the trial court erred in denying the petition for a change of venue. This contention is clearly a meritorious one. The hearing before the chancellor on August 9 took place during the summer vacation and at a time when the cause had been placed upon the regular calendar of another chancellor, which was to be called during the September term. Complainants contend that the application came too late, and they cite, in support of their contention, Crane v. Crane, 81 Ill. 165; Richards v. Greene, 78 Ill. 525; Ford v. Ford, 199 Ill. App. 468, but none of these cases sustains their contention. In Crane v. Crane the motion was not made until all the evidence had been heard by the court. In Richards v. Greene it was held that a party cannot wait until a cause is on trial, until the court has intimated an opinion on the merits of the case,

from the evidence, and then obtain a change of venue. In Ford v. Ford it appeared that the petition for a change of venue was not presented to the court until after the trial of the case had commenced. In the instant case all that the chancellor had done prior to the time of the application for a change of venue was to enter an agreed order. Defendants' petition for a change of venue complied with the statutory requirements and was presented in apt time, and on the ground alleged was the prejudice of Judge Fisher, he was bound to grant the petition. (People v. Scott, 326 Ill. 327, 342.)

The decree of the Circuit Court of Cook County is reversed and the cause is remanded to that court for further proceedings before some chancellor other than Judge Fisher.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

from the evidence, and then obtain a copy of the same. It is
to find it necessary for the Division for a copy of the same
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33765

LEONARD L. BEAR,
Appellant,

v.

JOHN J. SCHOCKET,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

256 I.A. 611²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The plaintiff, Leonard L. Bear, filed his affidavit for attachment in aid, alleging that the defendant, John J. Schocket, was indebted to him in the sum of \$5,000 and that the defendant was a non-resident of the State of Illinois. The defendant entered a so-called special appearance "for the purpose of quashing the writ of attachment in aid, and discharging the garnishees, and contesting the jurisdiction of the court in the attachment in aid proceedings of John J. Schocket as defendant." He also filed a traverse to the affidavit for attachment in aid in which he prayed that the writ be quashed and the garnishee discharged, "because he says that he is a resident of this State, * * and that he is not a non-resident of this State, and that he is not about to depart from this State and that he is not about to remove his property from this State." A jury was called to try the issues as to the attachment, and after evidence heard returned a verdict finding the issues for the defendant. Judgment was entered on the verdict, the attachment writ in aid was quashed, and all the garnishees named or summoned in the writ were discharged. The plaintiff has appealed from this judgment.

In our opinion the judgment appealed from is not a final, reviewable judgment. The Attachment Act provides:

RECORD L. DEAN,
Appellant;

vs.

JOHN L. DEAN,
Appellee.

APPEAL FROM DECISION OF THE COURT.

WILLIAM H. HARRIS,

Attorney for Appellant.

THE COURT OF APPEALS OF THE STATE OF TEXAS.

The plaintiff, Leonard L. Dean, filed his affidavit

for attachment in this cause, alleging that the defendant, John L.

Dean, was indebted to him in the sum of \$5,000 and that

the defendant was a non-resident of the State of Texas.

The defendant entered a verified special appearance for the

purpose of averring the truth of the statements in his affidavit

the partnership, and protesting the jurisdiction of the court in the

attachment in his proceedings as John L. Dean, as defendant.

He also filed a response to the plaintiff's affidavit in this cause

in which he stated that the sum of \$5,000 was not due him

because he says that he is a resident of this State.

and that he is not a non-resident of this State, and that he is

not about to depart from this State and that he is not about to

remove his property from this State. A judgment was entered

in favor of the plaintiff, and after several days' delay

a verified finding was entered for the defendant. Judgment was entered

in the verdict, the defendant was in all respects, and all the

parties named or mentioned in the writ were named. The

plaintiff has appealed from this judgment.

It is our opinion the judgment appealed from is not a final

judgment. The judgment is reversed.

"Sec. 27. The defendant may plead, traversing the facts stated in the affidavit upon which the attachment issued, which plea shall be verified by affidavit; and if, upon the trial thereon, the issue shall be found for the plaintiff, the defendant may plead or demur to the action as in other cases, but if found for the defendant, the attachment shall be quashed, and the costs of the attachment shall be adjudged against the plaintiff, but the suit shall proceed to final judgment as though commenced by summons."

"Par 31. Attachment in aid - Against nonresidents.)-Sec.31. The plaintiff, in any action of assumpsit, * * * may, * * * sue out an attachment against the lands * * * and effects of the defendants, which said attachment shall be entitled in the suit pending and be in aid thereof; and such proceedings shall be thereupon had as required or permitted in original attachments as near as may be; * * *

In Rabita v. Live Oak, Perry & Gulf R. Co., 245 Ill. App. 589, wherein the court held that an order denying a motion to vacate an order discharging garnishees in an attachment in aid of a suit to recover for nondelivery of goods, was not a final, reviewable judgment, the court said:

"The merits of the case are not properly before us because there is no final judgment entered in the case. The attachment in aid was merely an adjunct to the main suit, and until there is a final judgment entered in the main suit there is nothing before us of a final nature that we can review. Firebaugh v. Hall, 63 Ill. 81. The writ of error is therefore dismissed."

We concur in the above ruling.

The present appeal must be dismissed and it is so ordered.

APPEAL DISMISSED.

Barnes, P. J., and Gridley, J., concur.

"Sec. 27. The defendant may object, any time the
case is called in the official room of the court
house, which shall be verified by affidavit and if
the court is satisfied, the case shall be taken for the
plaintiff, the defendant may object to the return
of the writ, but if taken for the defendant, the
defendant shall be bound, and the order of the court
shall be enforced unless the plaintiff can show that
the return is false, in which case the court shall
order the writ to be issued."

"Sec. 28. The plaintiff is not bound to show that
the defendant is not a citizen of the United States
and the court shall order the writ to be issued if
the plaintiff shows that the defendant is not a citizen
of the United States, and the court shall order the
writ to be issued if the plaintiff shows that the
defendant is not a citizen of the United States."

In case of a writ of habeas corpus, the court shall
order the writ to be issued if the plaintiff shows
that the defendant is not a citizen of the United States
and the court shall order the writ to be issued if
the plaintiff shows that the defendant is not a citizen
of the United States, and the court shall order the
writ to be issued if the plaintiff shows that the
defendant is not a citizen of the United States."

court shall:

The writ of habeas corpus is not a writ of right
but a writ of privilege. It is a writ of right
in the sense that it is a writ of right to the
liberty of the individual. It is a writ of right
in the sense that it is a writ of right to the
liberty of the individual. It is a writ of right
in the sense that it is a writ of right to the
liberty of the individual."

It is a writ of right to the liberty of the individual.

The writ of habeas corpus is a writ of right to the liberty of the individual.

ALFRED W. HARRIS.

Witness, J. W. and J. W. Harris, Jr. Counsel.

33774

FUR MERCHANTS EXCHANGE, INC.,
a corporation,

Appellee,

v.

FUR MATCHING SERVICE, INC.,
a corporation, and JOSEPH KRAMMER,
Appellants.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

2581A. 611⁷

MR. JUSTICE SCARLAN DELIVERED THE OPINION OF THE COURT.

Fur Merchants Exchange Inc., a corporation, filed its bill for an injunction, in the Circuit Court of Cook County, against Fur Matching Service, Inc., a corporation, and Joseph Kramer. A decree was entered in accordance with the prayer of the bill, and the defendants have appealed.

The bill alleged that complainant had its principal place of business at 115 South Dearborn street, Chicago, and that its principal business was that of matching furs for the repair of fur coats and fur garments by tailors and furriers throughout the United States and Canada; that it had painted on the doors and windows of its place of business the words "Fur Matching Service" to indicate the nature of its business, and had expended large sums of money in advertising in trade journals and by circulars, and by distribution of pencils to the trade, and that in its advertising it had used the words "fur matching service" as descriptive of its business; that defendant Kramer opened a retail fur business in said building and patronized complainant, and that the officers and employees of complainant conveyed the impression to said defendant that complainant was doing a profitable business; that on April 28, 1928, said defendant caused to be incorporated, under the laws of Illinois, a corporation under the name "Fur Matching Service, Inc.,"

with its principal place of business at Room 217 in said building; that thereafter mail, packages and remittances intended for complainant were delivered to defendants and that customers intending to patronize complainant were misled by the name Fur Matching Service, Inc., that appeared on the bulletin board of said building and entered the place of business of defendant corporation, and that a great amount of confusion had resulted; that defendant Kramer organized said corporation in order to obtain the advantage of the money and efforts that had been expended by complainant in building up the fur matching business, and that, although requested, defendant corporation had refused to refrain from using the name "Fur Matching Service, Inc." to the damage of complainant, etc. The bill prayed that defendants be restrained from the use of the words "fur matching service" or any combination of such words. Defendants, in their answer, denied that defendant Kramer ever discussed the business of complainant with complainant's officers or employees or that he learned or was informed of anything concerning the business of complainant; denied that there had been any confusion in the delivery of mail or packages to complainant or defendant corporation, with the exception that on one occasion a package intended for complainant was delivered by the expressman to defendant corporation, and that in one instance a customer of said defendant, sending a remittance to said defendant in an envelope properly addressed to it, inclosed one also for complainant; denied that defendant corporation was incorporated for the purpose of securing the benefit of complainant's advertising or other efforts; denied that complainant made any objection to the use of the name of defendant corporation until the day before the filing of its bill, and denied that complainant had suffered any loss of business due to any act of defendants. The answer alleged that complainant had been guilty of laches in permitting defendants, without objection, to

with its principal place of business at 1111 17th Street, New York, New York, that thereafter mail, packages and telegrams received for transmission and were delivered to defendant and in 1934 defendant intended to purchase defendant's business was owned by the same defendant, Inc., that appeared on the bill of exchange as a defendant and was the principal place of business of defendant corporation, and a great amount of new order was received from defendant's business and defendant corporation in order to obtain the advantage of the money and efforts that had been expended by defendant in building up the business defendant, and that, although defendant, defendant corporation had refused to return from using the name "The National Service, Inc." to the damage of defendant, etc. The bill of exchange was defendant's retained from the use of the word "The National Service, Inc." any indication of such order, defendant, in their present, which that defendant's business was defendant's business of defendant with defendant's interest in defendant's business as a partner or as informant of defendant's business of defendant's business and that there had been any connection in the delivery of mail or package to defendant or defendant corporation, with the transaction and on one occasion a package intended for defendant was delivered by the defendant to defendant corporation, and that in the instance a customer of defendant, which a customer of defendant is an envelope properly addressed to it, instead was also for defendant's benefit and that defendant corporation was responsible for the purpose of obtaining the benefit of defendant's reputation or other efforts; and that defendant knew any objection to the use of the name of defendant corporation would be the only one the filing of its bill, and that defendant had entirely any loss of business due to any act of defendant. The answer alleges that defendant has been guilty of a crime in doing in defendant, which objection, as

expend large sums of money in advertising and otherwise developing its business. It further alleged that complainant had no exclusive right to the name "Fur Matching Service," as such name was merely descriptive of a business and that the business of matching furs was carried on by numerous furriers, and that to restrain defendants from using the words "Fur Matching Service" would tend to give complainant a monopoly of the fur matching business.

The master to whom the case was referred found that complainant had carried on a campaign of advertising its business and that in all of its advertisements it had stressed its fur matching service, and that it had built up a good name and reputation in the trade; that it had signs on the windows and doors of its place of business in which the words "fur matching service" were prominently displayed; that by reason of the length of time that complainant has been engaged in the fur matching business, and because of the nature of its advertisements, its patrons know and understand that complainant is engaged exclusively in the fur matching business; that complainant has never registered, as a trade-mark or trade-name, the words "fur matching;" that said words have never been a part of its corporate name; that the words "fur matching service" and "fur matching" are descriptive of the business of matching new and used pieces of fur for garments or samples submitted; that such business is not new or original with complainant, but has existed generally throughout the fur trade for many years and that the words "fur matching" and "fur matching service," or any combination of the same, are not subject to exclusive appropriation by complainant or any other firm or corporation, but are words which properly designate the character and service of the business; that such business, as conducted by complainant and defendant corporation, does not involve any trade secrets or secret processes, but consists solely in the matching of furs from stock to the sample of fur or

garment submitted, and involves only a knowledge of furs; that most furriers, to a limited extent, engage in the matching of furs, at least, so far as their stock of furs enables them to do so; that numerous concerns in Chicago and New York have been and are now engaged in the enterprise of matching furs, that a number of such concerns advertise their business as "Fur Matching" and "Fur Matching Service" in the fur trade magazines and that the business of such concerns is similar to that of complainant and defendant corporation; that defendant Kramer, in 1923, was engaged in the retail fur business at 115 South Dearborn street and occasionally patronized complainant and complainant from time to time patronized him; that about April 28, 1928, defendant Kramer caused to be incorporated the defendant corporation, with its principal place of business at Room 217, 115 South Dearborn street; that its business is described in the certificate of incorporation as "trading, dealing in, buying and selling, new and old skins and furs and kindred articles;" that since its incorporation it has displayed in signs on its windows the words "Fur Matching Service, Inc.," and underneath said name the words, "we match anything from head to tail," or "fur matching," or words of similar import descriptive of the nature of its business; that defendant corporation located its business in the said building after complainant was established there; that since its incorporation defendant corporation has advertised in different fur trade magazines and that in said advertisements it has used the words "fur matching service," which words have appeared as part of the corporate name of said defendant, together with the words, "we match anything from head to tail," "fur matching," and other words of similar import descriptive of the nature of defendants' business, but that said advertisements and articles given away by defendant corporation for the purposes of advertisement are not similar to those of complainant, but are entirely dissimilar, and that there is nothing in the advertisements of defendant corporation

which is calculated to mislead the public or members of the trade into believing that the business of said defendant is part of the business of complainant; that said advertisements are fairly written and show no intention on the part of defendants to copy the advertising of complainant in any manner, or to attempt to unfairly and illegally appropriate complainant's customers by such advertisements; that defendant corporation has spent large sums of money in connection with its advertising and as a result its business has grown and it is now doing a lucrative business; that there appear on the bulletin board of the building wherein the parties are located, under the proper alphabetical index, the words "Fur Matching Service, Inc., 215," and that directly below this appears the name of complainant; that neither of defendants ever learned from complainant any of its trade secrets, customers, prices or manner of conducting business, and that the "knowledge, information and skill" which defendants use in the operation of their business are such as are possessed by other individuals engaged in the fur matching service; that the business of fur matching in Chicago is conducted principally in the Mallers Building, at 5 South Wabash avenue, and the Adams Express Building, at 115 South Dearborn street; that in other buildings in the loop section of Chicago there are various other individuals and corporations engaged in the fur matching service; that Hecht and Becker and Knapp Fur Service are engaged in this business at 115 South Dearborn street; that on several occasions express packages and mail directed to and intended for complainant, "by mistake of the express man or mail carrier," have been delivered to defendant corporation; that on several occasions express packages and mail directed to and intended for defendant corporation, "by mistake of the express man or mail carrier," have been delivered to complainant; that while the names of complainant and defendant corporation, under ordinary circumstances, are sufficiently different to prevent confusion, yet, because of the fact that the said

which is intended to mislead the public in matters of the law.
 into believing that the justice of the law is being done.
 statement of complaint, it is said a complaint was filed with
 and then an investigation on the part of the government to see the
 of complaint in my report, it is necessary to include and identify
 appropriate complaint's answers to each complaint; that the
 remedy cannot be given until the complaint is received and it is now
 the government and as a result the business has been and it is now
 being a business business; that there is a report on the business
 of the business which the parties are located, under the report
 a business report, the report "The National Business, Inc., 1917, and
 the business report this report is the same as complaint; that the
 of business even further from complaint and of the business
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 "business, information and bill" which business and in the business
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parties are in the same building and "because of the juxtaposition of the names on the bulletin board; because of the similarity of service rendered by the complainant and the principal defendant; and, because of the further fact that the principal defendant has adopted as its name the words 'Fur Matching Service,' which are the identical words which the complainant had prominently used in all its advertising, individuals of ordinary intelligence, intending to call on the complainant, can easily become confused and mistakenly bring their business to the principal defendant, ignorant of the fact that they were not doing business with the complainant; that while no evidence was offered that this has happened in any specific case, yet the Master believes there is great probability that this has occurred and will continue to occur even without any overt act on the part of the principal defendant;" that in some instances the misdelivery of mail and express packages heretofore referred to was caused by the fact that they had not been properly addressed; that where error in this regard has occurred complainant and defendant corporation have rectified the same; that neither of the parties intended to divert any article, remittance or package intended for the other; "that the principal defendant has a right to the use of its corporate name, and has the further right to conduct its business in competition with the complainant and to engage in its business without any restrictions; but the Master finds that because of the peculiar combination of circumstances and facts, as above stated, the defendants are guilty of unfair competition if they are permitted to occupy the same building and use the name 'Fur Matching Service, Inc.' which appears on the bulletin board directly above the name of the complainant." The Master recommended that a decree be entered perpetually enjoining defendants "from using the words 'fur matching service' in its corporate name, or any other combination of words similar thereto in connection with their said business located at 115 S. Dearborn Street."

parties are in the same position and because of the fact that
 of the name as the principal defendant because of the similarity of
 service rendered by the complainant and the defendant in the
 and, because of the fact that the principal defendant has
 adopted as its name the words "The Marketing Service", which name
 the defendant would have the complainant and defendant who was in all
 its operations, in addition to ordinary intelligence, according to
 call on the complainant, and finally because the defendant has
 being their business to the principal defendant, inasmuch as the
 fact that they were not doing business with the complainant but
 while no witness was called in this case it is apparent in any case
 that the defendant believed that it was probable that this
 has occurred and will continue to occur even without any word or
 the part of the principal defendant. That is what is intended by
 misdelivered of call and express packages heretofore and that is what
 caused by the fact that they are not properly addressed and
 there error in this regard has occurred complainant and defendant are
 parties have received the goods and a notice of the parties intended
 to deliver any articles, remittances or packages intended for the other;
 "that the principal defendant was a party to the use of the complainant
 name, and that the principal defendant was a party to the use of the complainant
 after the complainant had so stated in the business with the complainant
 stated that the principal defendant had been a party to the use of the complainant
 defendant and that the principal defendant, the defendant and the complainant
 make a comparison of the two and find that the defendant and the complainant
 and use the name "The Marketing Service", which appears on the
 defendant's name and find that the name of the complainant, the
 master recommended that a decree be entered perpetually restraining
 defendant "from using the words 'The Marketing Service' in the con-
 nexion with or any other connection of goods similar to those in
 connection with which the defendant is engaged as a business."

Objections to the report were overruled by the master and the chancellor overruled all exceptions to the report and entered a decree in accordance with the findings and recommendation of the master.

Defendants contend that the decree in the present case is erroneous and contrary to the evidence and the law. We are entirely in accord with this contention. "Unfair competition consists in passing off or attempting to pass off, upon the public, the goods or business of one person as and for the goods or business of another. It consists essentially in the conduct of a trade or business in such a manner that there is either an express or implied representation to that effect." (38 Cyc. 756.) "The essence of unfair competition is fraud. It is said in Howe Scale Co. v. Wyckoff, 198 U. S. 119, that it 'consists in the sale of the goods of one manufacturer or vendor for those of another, and if defendant so conducts its business as not to palm off its goods as those of complainant the action fails.'" (DeLong Co. v. Hump Hairpin Co., 297 Ill. 359, 371.) "Fraud is the gist of actions of this kind." (Koebel v. The Chicago Landlords' Protective Bureau, 210 Ill. 176, 183; Ambassador Hotel Corp. v. Hotel Sherman Co., 226 Ill. App. 247, 265; see also The Stevens-Davis Co. v. Mather & Co., 230 Ill. App. 45, where the cases bearing on this subject are reviewed.) The evidence clearly establishes that "fur matching" is a distinct business and has existed for many years, and that the words "fur matching service" and "fur matching" accurately designate the character and service of the business. Numerous firms in the United States are engaged in this business. In Chicago, a number of concerns are engaged in this business exclusively, and some of these use words in their names that aptly describe the nature of the business. All of them, in their advertisements, use the words "fur matching" or

"fur matching service." Several firms, other than complainant and defendants, are engaged in this business at 115 South Dearborn street, and practically all of the firms are located in the latter building or in the Mallers Building, 5 South Wabash avenue. The evidence clearly shows that defendant corporation did not so conduct its business as to palm off its goods as those of complainant. Not a single witness testified that he purchased defendant corporation's merchandise or service, believing it to be the merchandise or service of complainant, or that defendant corporation had represented to anyone that the goods or service of defendant corporation were those of complainant, or that he had been deceived by the conduct of defendant corporation and as a result had purchased the latter's merchandise or service, or that defendant corporation did any act or was responsible for any act which deceived or misled a single person. "In close cases, where the deceptive tendency is not clear, equity will withhold its hand until actual deception has resulted." (38 Cyc. 775.) But as we read the record, defendant corporation has been honest and fair in its method of doing business. The name of complainant might well deceive the unwary, as it suggests a clearing-house for fur merchants.

It will be noted that complainant does not contend that the name of defendant corporation simulates its name. Complainant's bill is apparently based upon the theory that because it used, in its extensive advertising, the words "fur matching service" it thereby acquired some superior right to the use of the same, although complainant now concedes that these words accurately and aptly describe the nature of the business in which defendant corporation and many others are engaged and that defendant corporation has the right to the use of its corporate name anywhere save in the building at 115 South Dearborn street. Complainant has no more superior right to the use of the words in question than a wholesale grocer would have to the

use of the words "wholesale grocer" merely because he used them extensively in his advertisements. Complainant concedes that it had not adopted the words in question as a trade-mark or trade-name, but even if it had, under the authorities such adoption would avail it nothing, as "it is a fundamental rule that terms merely descriptive of the goods or business to which they are applied cannot be exclusively appropriated as trade-marks or trade-names."

(38 Cyc. 708; Bolander v. Peterson, 136 Ill. 215, 218-9; Ball v. Siegel, 116 Ill. 137.) In support of its contention that the

decree should be sustained, complainant cites the following cases:

International Committee of Young Women's Christian Associations v. McFell Electric and Telephone Co. v. Young Women's Christian Association of Chicago, 194 Ill. 194; McFell Electric Co., 110 Ill. App. 182; Messler v. Jacobs, 66 Ill. App. 571.

In the first it was held that the use of the name "International Committee of Young Women's Christian Associations" will be enjoined at the suit of the Young Women's Christian Association of Chicago, it appearing that such name was advisedly adopted by the defendant for the purpose of misleading the general public, and persons from whom it hoped to receive support by way of donations, into believing that it stood as the committee and representative of the Young Women's Christian Association. In the second it was held that where a stockholder in the "McFell Electric Company" had conferred on a corporation the right to use his name in the corporate name and afterwards sold his stock to such corporation for a valuable consideration, he could not afterwards organize a corporation under the name "McFell Electric and Telephone Company" and then locate its business in the same building as the complainant, as such actions on his part had every appearance of an attempt to mislead the public and to obtain, by deception, the benefit of the patronage and clientage enjoyed by the original corporation. In the third case the complainants had been doing business under the style of "Six Little

one of the words "holistic" was used because he was then
extensively in his work. In his work, however, it
has not changed the words in general as a result of the
name, but even if it had, under the authorized name, it would
avail it nothing, as it is a trademark. It is not
descriptive of the goods or services in which they are used, and
not be exclusively appropriated as trademarks or service marks.
(See also: McFell Electric and Telephone Co. v. McFell
Electric Co., 111 Ill. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

Tailors" and they obtained an injunction against the defendants from doing business under the name and style of "Six Big Tailors." Complainant has failed to cite any case that supports the instant decree.

"Descriptive terms and generic names are publici juris and not capable of exclusive appropriation by any one, but may be used by all the world in an honestly descriptive and non-deceptive manner," (38 Cyc. 800) and "in all this class of cases where the word, name, or other mark or device is primarily publici juris the right to relief depends upon the proof. If plaintiff proves that the name or word has been so exclusively identified with his goods or business as to have acquired a secondary meaning, so as to indicate his goods or business and his alone, he is entitled to relief against another's deceptive use of such terms. If he fails in such proof, he is not entitled to relief." (Ib. 769-70.) Complainant concedes, as it must, that the words in question describe only the nature of the business in which it, the defendant corporation, and many others are engaged, and therefore neither it nor any other firm has an exclusive or superior right to the use of the words.

After a careful examination of the evidence bearing upon the misdelivery of mail and express packages and the position of the names of the parties on the bulletin board of the building, we are satisfied that the master and the chancellor gave to these circumstances unwarranted weight and effect. "Unfair competition is always a question of fact. The question to be determined in every case is whether or not, as a matter of fact, the name or mark used by defendant has previously come to indicate and designate plaintiff's goods, or, to state it another way, whether defendant, as a matter of fact, is by his conduct passing off his goods as plaintiff's goods, or his business as plaintiff's business." (Ib.

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779-80.) To entitle a complainant, in cases of this character, to the relief sought, the right must be clearly established by the evidence. (Ball v. Siegel, *supra*, 147.)

The decree of the Circuit Court is reversed and the cause is remanded with directions to the chancellor to dismiss complainant's bill for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

Barnes, F. J., and Gridley, J., concur.

772-80.) To entitle a complaint, in case of this character,
to the relief sought, the right must be clearly established by

the evidence. (Bell v. Bell, 1917.)

The record of the Circuit Court is reviewed and the
same is remanded with directions to the Chancellor to dismiss

complaint's bill for want of equity.

REVEREND AND HONORABLE JOHN H. CHASE

Bell, v. Bell, 1917, 1918, 1919, 1920.

33843

WILLIAM T. WOODLEY,
Appellant,

vs.

FRANK J. LODGE,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

256 I.A. 612¹

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal Court of Chicago, William T. Woodley, plaintiff, sued Frank J. Lodge, defendant. The plaintiff entered into a written lease with the defendant, by the terms of which the plaintiff leased to the defendant a certain apartment in the apartment building known as 5493 Cornell avenue, Chicago, for a period of one year from October 1, 1921, at a rental of \$70 per month. Plaintiff alleged that there was due him, under the lease, rent for the months of May, June, July, August and September, 1922, together with attorney's fees. The defendant's amended affidavit of merits alleged (inter alia) that on or about April 30, 1922, he negotiated with the plaintiff for a surrender and cancellation of the lease, and at that time, in consideration of the defendant immediately surrendering possession of the premises, "plaintiff agreed to and did cancel and accept a surrender of said lease," and that the defendant, with the consent of the plaintiff, vacated and surrendered the apartment, and that the defendant is not indebted to the plaintiff for rent in any amount. The case was tried before the court, with a jury, and there was a verdict returned finding the issues against the plaintiff. Judgment was entered on the verdict and this appeal followed.

Because of the fact that they had a baby, the defendant and his wife reached the conclusion that the apartment in question was not large enough for them and that "in all fairness to the youngster they should move and seek larger quarters." They expressed these views to the plaintiff and he admitted that they would be better off in a larger apartment. The defendant and

his wife "took it for granted" from this admission of the plaintiff that he was willing to allow them to surrender the premises, and they secured another apartment and moved from the premises on May 1. The plaintiff testified that he never agreed to cancel the lease and that he told the defendant and his wife that he would assist them in re-renting the apartment. The defendant's wife testified that the plaintiff never at any time mentioned anything about cancelling the lease, and the testimony of the defendant is to the same effect. The plaintiff further testified that he made every effort to re-rent the apartment for the defendant but was unable to get any tenant during May, June, July, August and September, 1922. The defendant, in his petition to vacate judgment, alleged that his defense was that he had a specific agreement with the plaintiff to cancel the lease as of April 30, 1922, if defendant immediately vacated and surrendered possession of the premises, and there is much force in the contention of plaintiff that the defendant failed to sustain this affirmative defense.

The defendant called the plaintiff as a witness under section 33 of the Municipal Court Act, and, over the objection of the plaintiff, was permitted to prove that the plaintiff owned other large apartment buildings and the number of apartments in the buildings. Whether or not there was an agreement for the cancellation and surrender of the lease was the only issue in the case. The testimony adduced from the plaintiff brought before the jury the fact that the plaintiff was a rich landlord, and such fact was entirely irrelevant to the only issue in the case and was well calculated to prejudice the case of the plaintiff. It was error to permit the examination in question. (See Jones & Adams Co. v. George, 227 Ill. 64, 70; McCarthy v. Spring Valley Coal Co., 232 Ill. 473, 479; Kurtz v. Evans, 201 Ill. App. 180; Angelos v. Pallas, 150 Ill. App. 527, 529.)

The plaintiff contends that certain conduct of the trial court was highly prejudicial to the plaintiff's case with the jury. The occurrence that forms the basis of the instant contention is not at all likely to occur on another trial and we deem it unnecessary to pass upon the merits of the instant contention, and we do not deem it necessary to pass upon other contentions made by the plaintiff.

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gidley, J., concur.

The plaintiff contends that certain evidence of the trial court was rightly excluded in the plaintiff's case and the jury. The defendant does not deny the basis of the plaintiff's contention is not of all things as shown on another trial and we deem it unnecessary to pass upon the merits of the plaintiff's contention, and as it is not shown it is necessary to pass upon other contentions made by the plaintiff.

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded.

REVEREND AND HONORABLE.

Chicago, Ill., and Chicago, Ill., January 11, 1907.

33848

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256 I.A. 612²

PAULINA NORKEVICH,
Administratrix of the
estate of MIKE NORKEVICH,
deceased,

Appellee,

v.

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY,
a corporation,

Appellant.

APPEAL FROM SUPERIOR

COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Superior Court of Cook County, in an action on the case, Paulina Norkevich, Administratrix of the Estate of Mike Norkevich, deceased, plaintiff, sued The Atchison, Topeka and Santa Fe Railway Company, a corporation, defendant. There have been two trials of this case. The first resulted in a verdict in favor of the plaintiff in the sum of \$17,500. The judgment entered on this verdict was reversed in this court and the cause was remanded. (See Norkevich, Admx., etc. v. Atchison, Topeka & Santa Fe Railway Co., 250 Ill. App. 637.) On the second trial there was a verdict in favor of the plaintiff for the sum of \$12,500. Judgment was entered on the verdict and this appeal followed.

On the first appeal, we reversed the judgment on the ground that the verdict was clearly against the weight of the evidence. In our opinion we stated very fully the material facts and circumstances and our conclusions in reference thereto. On the present appeal the defendant again contends (inter alia) that the verdict is clearly against the weight of the evidence. In our consideration of this important contention we have had the benefit of exhaustive briefs and lengthy oral arguments. After a careful

study of the record and a consideration of the arguments of counsel, we have reached the conclusion that the contention of the defendant is a meritorious one. In reaching this conclusion we have given due weight to the fact that two juries have found for the plaintiff.

Counsel for the plaintiff has earnestly and ably endeavored to show that the plaintiff's case on the present record is stronger than it was on the first, but in our judgment it is weaker. We are satisfied that it would be an injustice to permit the present judgment to stand. No useful purpose would be served by again reciting the evidence and commenting upon the same, and as plaintiff may see fit to have the case tried again, we refrain from doing so.

The judgment of the Superior Court of Cook County is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

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reversed and the case is remanded.

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MARCELLA BUOSCIO,
Appellee.

v.

HENRY BUOSCIO,
Appellant.

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

256 I.A. 612³

MR. JUSTICE SCAMLAN DELIVERED THE OPINION OF THE COURT.

The complainant, Marcella Buoscio, filed her bill of complaint in the Superior Court of Cook County, asking for a decree of separate maintenance against the defendant, Henry Buoscio. After the defendant had filed an answer, the complainant made a motion for the allowance of temporary alimony and solicitor's fees. In the answer of the defendant, and also in his reply to the motion, he denied that he and the complainant had ever been married. The chancellor heard evidence in reference to the motion and thereafter entered an order that contains (inter alia) the following:

"That on February 26th, 1927, the defendant herein exhibited to the complainant a document purporting to be a license authorizing the marriage of the parties hereto; that the defendant then and there informed the complainant that he had arranged with a Justice of the Peace at Indiana Harbor to perform the ceremony, and induced the complainant to accompany him to said Indiana Harbor, where a marriage ceremony was duly performed in apparent compliance with the law in relation to marriage and a certificate issued pronouncing the parties hereto man and wife.

The court further finds that the parties hereto thereafter lived and cohabited with each other as man and wife at various places, and particularly at the home of complainant's father at Chesterton, Indiana, two or three nights each month until the month of March, 1928, when the act of cruelty described in said bill of complaint took place; that as a result of the aforesaid cohabitation of the parties hereto, one child, Iris, was born on August 30, 1928, as legitimate issue of the defendant.

The court further finds that the defendant is strong, able-bodied, is capable of working and of earning a living for the support of himself and of the complainant and their child; that the defendant is earning sufficient money to support himself and to pay \$10.00 per week as alimony and for support of said child, and in addition thereto a solicitor's fee of \$100.00 in ninety days."

The order provided that the defendant pay to the complainant, as temporary alimony for the support of herself and child \$10 a week, and \$100 solicitor's fees. The defendant has appealed from the order.

The defendant contends that "proof of marriage is essential in an action for separate maintenance." This contention may be conceded.

The defendant contends that "there must also be a valid marriage before a wife will be entitled, either in a divorce suit or a separate maintenance suit, to an allowance for temporary alimony or solicitor's fees; and when the marriage is not proved or the complainant's right to ultimate relief is for any reason doubtful, the motion for a temporary allowance should be denied," and the defendant further contends that the proof in the instant case "was far short of what is required on a motion for temporary alimony or solicitor's fees." The rule that governs the present appeal is thus stated by our Supreme Court:

"Temporary alimony pendente lite may be allowed without a marriage being proved, though a prima facie case should be required to be shown in behalf of the wife. (2 Am. & Eng. Ency. of Law, - 2d ed. - p. 101, and cases there cited.) * * * It is no objection to the allowance of alimony pending the wife's bill for separate maintenance that the husband denies the facts alleged by her. The court may, if it deems necessary, enter into a sufficient examination to determine the good faith of the complainant in exhibiting her bill, which will ordinarily be confined to an inspection of the pleadings. Harding v. Harding, 144 Ill. 588; Cooper v. Cooper, 185 id. 163." (Reifschneider v. Reifschneider, 141 Ill. 92, 99.)

The rule thus stated is the one that is followed in most of the sister states. After a careful examination of all the facts and

circumstances bearing on the question as to whether or not there was a valid marriage between the complainant and the defendant, we are satisfied that the complainant proved a prima facie case, and this was sufficient for the purposes of the instant motion. The defendant contends that the chancellor, in reaching his findings, assumed that section 18 (1) ch. 89, Cahill's Ill. Rev. St., 1927, had a bearing on the question before us. We agree with the defendant that this section has no bearing on that question, but we are satisfied that the proof in the case supports the findings of the chancellor. The chancellor expressed the opinion that the defendant was "telling an untruth all the way through * * *; that he was not telling the truth and had no intention of telling the truth about it." The record justifies the chancellor's opinion in this regard.

The defendant contends that "the allowance for temporary alimony and solicitor's fees was excessive." We find no merit in this contention. The chancellor found that the defendant was a strong, able-bodied man, capable of working and earning a living for the support of himself and the complainant and their child. The defendant works only at odd jobs and he is determined, apparently, to avoid, if possible, the payment of any money for the support of his wife and child. It appears that he is able to engage in litigation to escape the performance of the decree. What was said in Barclay v. Barclay, 184 Ill. 471, 476, and Reifschneider v. Reifschneider, supra, 101, applies to the present case.

The decree of the Superior Court of Cook County is a just one and it should be and it is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

33927

FRANCES KUZNICKI,
Appellee,

v.

JOHN NEFELD,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

256 L.A. 512⁴

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal Court of Chicago, Frances Kuznicki, plaintiff, sued John Nefeld, defendant, to recover \$270 for board, room, laundry and care alleged to have been furnished the defendant and his four minor children by the plaintiff. The case was tried by the court, without a jury, and there was a finding against the defendant and the plaintiff's damages were assessed in the sum of \$165. Judgment was entered on the finding and the defendant has appealed. The plaintiff has not filed a brief in this court.

The defendant contends that "the finding is against the manifest weight of the evidence." There is no merit in this contention. We are in accord with the finding of the trial court.

The defendant contends that "the Court erred in admitting improper testimony as to reasonable value." The plaintiff, the grandmother of the children and a housekeeper for many years, testified as to the value of the board, room, laundry and care furnished the four children by her, and the defendant contends that she was not qualified to give "expert testimony" as to the value of the board, etc. This contention is without the slightest merit. The witness was well qualified to give testimony as to the value of the board, etc.

PLAINTIFFS
vs.
DEFENDANTS
appealed
appeal

STATE OF NEW YORK
COUNTY OF NEW YORK

12527

In the Municipal Court of the City and County of New York, the undersigned, the Plaintiff, do hereby certify, to wit: That the within and foregoing are true and correct copies of the original and true copy of the same, as the same were filed by the undersigned, and the same were received in due form of law. The undersigned do hereby certify that the within and foregoing are true and correct copies of the original and true copy of the same, as the same were filed by the undersigned, and the same were received in due form of law. The undersigned do hereby certify that the within and foregoing are true and correct copies of the original and true copy of the same, as the same were filed by the undersigned, and the same were received in due form of law.

The undersigned do hereby certify that the within and foregoing are true and correct copies of the original and true copy of the same, as the same were filed by the undersigned, and the same were received in due form of law. The undersigned do hereby certify that the within and foregoing are true and correct copies of the original and true copy of the same, as the same were filed by the undersigned, and the same were received in due form of law. The undersigned do hereby certify that the within and foregoing are true and correct copies of the original and true copy of the same, as the same were filed by the undersigned, and the same were received in due form of law. The undersigned do hereby certify that the within and foregoing are true and correct copies of the original and true copy of the same, as the same were filed by the undersigned, and the same were received in due form of law.

The defendant last contends that the court erred in admitting a certain statement or report of the Court of Domestic Relations. This contention is also without the slightest merit. It appears that during the examination of the defendant he testified that the plaintiff had him brought before the Court of Domestic Relations at one time and that the court ordered him to pay "forty-five dollars a half month," and that he had made certain payments on the order. A dispute arose as to how much the defendant had paid on the order and upon the suggestions of the trial court the counsel for both sides went to the clerk's office to find out from the records the amounts that had been paid by the defendant under the court order. Thereafter the counsel reported to the court the total amount that had been paid by the defendant under the order and the balance that was still due under the order. It is clear that the counsel for the defendant acquiesced in the procedure adopted. Moreover, if the evidence in reference to the records of the Court of Domestic Relations is entirely disregarded, there is still ample evidence in the record to sustain the finding and judgment of the court.

The judgment of the Municipal Court of Chicago is a just one and it should be and it is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

Abst

Filed Feb 3-1930

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256 I.A. 612⁵

General No. 8333

Agenda No. 1

DECEMBER TERM, A. D. 1929

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

vs.

FRED HYDE Plaintiff in Error.

Writ of Error to County Court of Pike County.

ELDREDGE P. J.

An information was filed by the State's Attorney of Pike County consisting of two counts, in the first of which it is charged that the plaintiff in error, Fred Hyde, on the fifteenth day of December, 1928 unlawfully and willfully possessed, for the purpose of sale, certain intoxicating liquor. In the second count it is charged that the plaintiff in error on said day did unlawfully and willfully sell said certain intoxicating liquor. Upon the trial of said cause, the plaintiff in error was convicted on both counts and on the first count was sentenced to be imprisoned in the State Farm at Vandalia, Illinois, for six months and on the second count he was sentenced to pay a fine of \$600.00 and imprisoned in the State Farm for six months and stand committed until otherwise discharged according to law.

The evidence for the People tended to show that

one Orville Clemmons and Donald Luzader, alias Chick Niccum, alias Lewis O'Donnall, came to the sheriff's office at Pittsfield and told the sheriff, and also his deputy, Johnson, that the plaintiff in error was selling whiskey. Luzader asked the sheriff to be permitted to sign a complaint and the affidavit for the purpose of procuring a search warrant of the premises occupied by the plaintiff in error. After the search warrant was procured, by agreement made between Clemmons, Luzader and the sheriff, Clemmons and Luzader were to proceed to a place designated as the Barry Cemetery where they were to await the arrival of the State's Attorney, the sheriff, and two deputy sheriffs, Johnson and Fitch. Clemmons and Luzader were then to proceed in their car to the house of plaintiff in error and purchase some whiskey while the State's Attorney, the sheriff, and the two deputies were to wait for them at the "Four Corners." Clemmons and Luzader accordingly proceeded in their automobile to the house and Luzader went into the house and testified that he bought a pint of whiskey from the plaintiff in error. Clemmons remained in the car until Luzader returned with the bottle. They thereupon went back to the "Four Corners", handed the whiskey to the deputy,

Johnson, and all of them proceeded to the house and made a search thereof. When they entered the house, Mrs. Hyde, the wife of the plaintiff in error, poured some liquor from a bucket into the sink and some of it upon the stove where it burned with a blue flame; that the liquor so poured from the bucket had the appearance of being alcohol, and one of the deputies also said that he tasted some of it as it came out of the drain pipe in the sink but did not testify that it tasted like alcohol or intoxicating liquor. No other liquor was found upon the premises occupied by the plaintiff in error, but in a field adjoining the premises and separated therefrom by a fence, a five-gallon jug containing intoxicating liquor and a basket containing a number of bottles of the same were discovered.

The evidence shows that the witness Clemmons, at the time he testified, was a defendant in an information filed by the State's Attorney for selling intoxicating liquor which was then pending in the County Court of Pike County. It further shows that the witness Luzader had served a sentence in some jail or prison in the State of Missouri for the commission of some criminal offense. When the witness Luzader was

asked on cross examination if he didn't procure the money with which to purchase the point of whiskey from the plaintiff in error by selling whiskey himself, he declined to answer, claiming his constitutional privilege on the ground that to do so would incriminate himself. Again, when he was asked if the pint of liquor which he testified he purchased from the plaintiff in error wasn't part of the store of liquor which he and Clemmons peddled or attempted to peddle, he claimed the same privilege. After the trial, he made an affidavit in support of a motion for a new trial in which he stated that he did not buy the pint of whiskey in question from the plaintiff in error. A number of witnesses testified that the general reputation of the witness Clemmons in the neighborhood where he resided was bad and they would not believe him under oath. The witness Kendrick stated that he was in the stock business in connection with the King Milling Company and that night was in the house of plaintiff in error and was playing the radio when Luzader came in, and saw no liquor sold. The witness Wernowsky was in the house at the time and was rooming there and likewise testified that he saw no liquor sold to Luzader. In the affidavit made by Luzader after the

trial, he stated that shortly before the trial he was living with a sister, Mrs. Glover, at Hannibal, Missouri, and that on the night of January 23, 1929, one W. R. Marks came to his sister's house in Hannibal and took him away by force; that when he resisted, Marks assaulted him with a black jack and finally overpowered and handcuffed him; took him in his automobile across the river into Illinois where he was delivered to a deputy sheriff of Pike County; that the deputy sheriff was near his sister's house when the assault took place and followed Marks and himself from the City of Hannibal until they crossed into the State of Illinois when he was transferred to the car of the deputy sheriff who brought him to the county jail of Pike County; that he had not been subpoenaed as a witness and did not want to go; that he was kept in jail all that night and was told that if he did not say that he had bought liquor from the plaintiff in error, he would be punished for contempt and given from one to twenty years and that he testified as he did under duress when in truth and in fact he never bought any liquor from the plaintiff in error. The sheriff made a counter affidavit in which he averred that he did not talk or speak concerning this case to Luzader either

on the night of January 23, 1929, nor on the morning of January 24 while Luzader was in his custody in the jail in Pike County and that the affidavit of Luzader is false in so far as it refers to the sheriff exercising influence or coercion on Luzader to produce evidence or testimony at the trial of said cause. The State's Attorney also filed a counter affidavit to the effect that Luzader was examined by him before the County Judge and such examination was taken by a stenographer and the same is attached to the affidavit. No other counter affidavits were filed.

The evidence clearly shows that both Clemmons and Luzader had been convicted of criminal offenses or were defendants in actions involving the same at the time of the trial and were of such questionable character that their evidence is entitled to very little credit, if any. The only evidence against plaintiff in error under the second count of the information charging him with the sale of liquor is that Luzader who repudiates his testimony in regard thereto made on the trial by his subsequent affidavit. His testimony is also contradicted by the plaintiff in error and the two witnesses, Kendrick and Wernowsky. When asked on cross examination whether the whiskey which he claimed that he bought from said plaintiff in error was in

fact whiskey which he and Clemmons had been peddling themselves, he refused to answer on the ground that his answer would incriminate himself. There are no corroborating facts or circumstances tending to support his testimony as to the purchase by him of the pint of whiskey in question.

In regard to the first count charging the plaintiff in error with unlawfully having possession of intoxicating liquor, his guilt rests upon the evidence of the officers to the effect that his wife poured some fluid out of a bucket into the sink and onto the stove and that when it came in contact with the stove it burned with a blue flame. There is no proof that the liquor contained in the five-gallon jug and the basket which were found in the vacant lot separated from the premises of the plaintiff in error by a fence was ever in the possession of the plaintiff in error.

This is not a case where the evidence presents such a state of facts that reasonable minds could come to no other conclusion but that the plaintiff in error was guilty, and consequently, if any errors were committed on the trial which might have prejudiced his interests, the judgment must be reversed.

The witness Clemmons was permitted to testify over objection that before the search warrant was issued, he and Luzader went to the sheriff and told him that plaintiff in error was selling whiskey; that Luzader bought the whiskey; that after he bought the same he came to the car in which the witness was waiting and said, "Well, I got it." The witness Luzader was permitted to testify over objection that he told the sheriff that the plaintiff in error was selling whiskey and that he requested the sheriff for permission to sign the complaint for the search warrant. The sheriff was permitted to testify to his conversations with Luzader and Clemmons before the search warrant was issued as follows:

"Mr. Luzader and Clemmons came to the jail office something about six o'clock and told me about Jimmy Hyde having liquor and selling liquor and thought they ought to do something about it, so I questioned them about what they knew about it. They told me they had plenty. I asked them if they could buy it. They said they could, I said all right we will buy some. I'll go down there with you. Well, they said we are willing to sign a search warrant as we seen the

liquor and well, we decided to let them sign the search warrant. They agreed then to buy a pint and let us watch them buy it."

The witness Johnson was also permitted to testify over objection that Clemmons and Luzader came to the jail that night and told him about "Jimmy Hyde selling liquor at Canton." One of the samples of liquor which was admitted in evidence bore the label, "Liquor bought by Donald Luzader from Fred Hyde, December 15, 1928." Another exhibit was labeled, "Liquor taken from five-gallon jug on December 15, 1928, at Fred Hyde's place, R. A. Shive." The five-gallon jug in question was not found on the premises of the plaintiff in error but on a vacant lot as heretofore noted. All the above evidence was incompetent and prejudicial to the interests of plaintiff in error.

The third instruction given on behalf of the People is a substantial copy of the second section of the Prohibition Act and states that under said Act it is unlawful to manufacture, transport, deliver, furnish or possess any intoxicating liquor except as authorized by the Act and that the provisions of said Act should be **liberally**

construed to the end that the use of intoxicating liquor as a beverage may be prevented. This instruction, in effect, tells the jury that they should not only construe the Act but should give it liberal construction. This section of the Act is for the benefit of the courts and their guidance in the construction thereof. The construction of laws is for the courts and not for juries and this is true in the first instance even of laws for the prevention of crime notwithstanding that archaic absurdity which the legislatures have permitted to remain on the statute books for so many years, that in criminal cases juries are the judges of the law as well as the facts.

Instruction number eight attempts to define a reasonable doubt. Such instructions have been condemned so many times that further comment is unnecessary.

The eleventh instruction informs the jury that in passing upon the credibility of the defendant, they have a right to take into consideration his demeanor and conduct upon the witness stand and **during the trial**. In a criminal case, the demeanor and conduct of the defendant during the trial when not testifying is no part of the evidence and

the jury have no right to consider it as such. **Purdy v. People**, 140 Ill. 46; **People v. McGinnis**, 234 Ill. 68.

The thirteenth instruction states that one of the tests for determining the credibility of a witness is his interest in the result of the suit and that, "as a general rule a witness who is interested in the result of the suit will not be as **honest, candid** and **fair** in his testimony as one not interested but the degree of credit to be given to each and all witnesses is a question for the jury alone." The above instruction might be less harmful in a civil case where it would apply to both the plaintiff and the defendant as each would be interested in the result and according to the instruction each would be equally dishonest in this testimony, but in a criminal case where there is but one person particularly who might be interested in the result of the suit the effects of such an instruction is to inform the jury that presumptively the defendant is unworthy of belief.

The fifteenth instruction given by the People tells the jury that, in passing upon the witness **for the defendant**, they have the right to take into consideration

any interest which they may feel in the result of the suit if any is proved, growing out of their relationship to the defendant or otherwise, and to give to the testimony of such witnesses only such credit as you think it is entitled to under all the circumstances proved at the trial. It is an elementary rule that all instructions in regard to the credibility of witnesses should apply to all the witnesses in the case and that the witnesses of one party or the other should not be singled out and the test applied to them alone. The use of the word, "only," tends also to belittle or disparage the credit to be given such witnesses.

In view of the errors above pointed out in the trial of the case, and the weakness of the testimony for the People, in our opinion the plaintiff in error is entitled to a new trial. The judgment is therefore reversed and the cause remanded .

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Filed Feb 3-1930
2a
256 I.A. 613'

General No. 8346

Agenda No. 7

OCTOBER TERM, A. D. 1929

Mattie F. Henry, Conservatrix and ex-officio administratrix of the estate of Samuel Farlow,
Deceased, Appellant.

vs.

Fred Farlow, et al., Appellees.
Appeal from Circuit Court Adams County.

ELDREDGE P. J.

On August 8, 1928 appellant, Mattie F. Henry, as conservatrix and ex-officio administratrix of the estate of Samuel Farlow, deceased, made a final report in the County Court of Adams County which showed there was on hand a balance for distribution of \$1,737.40 which the court ordered to be paid, one third to the widow and two fifteenths to each of the five heirs. The Court decreed the above distribution but in the order held the estate should be kept open and that appellant should continue to be conservatrix and ex-officio administratrix for the sole and only purpose of releasing any unreleased mortgages or deeds of trust which had been made in favor of Samuel Farlow during his lifetime and which stand unreleased of record in his name until the further order of the court.

Appellees are the heirs of said Samuel Farlow, deceased, and appealed from that part of the order of the County Court which ordered the estate to be kept open and appellant to remain as conservatrix and ex-officio administratrix for the purpose of releasing unreleased mortgages and trust deeds to the Circuit Court. Upon a hearing in the Circuit Court, the latter held that the estate should be closed and found that there were no unreleased mortgages or trust deeds and ordered appellant to make the distribution and close the estate. From this order of the Circuit Court appellant appeals.

The first question raised is, that appellees, who are the heirs of the deceased, had no right to appeal from the order of the County Court as after that Court had entered the order of distribution they were not further interested in the estate and could not be classed as parties aggrieved giving them a right to appeal therefrom. With this contention, we do not agree. The heirs were the only parties interested in the administration of the estate and in our opinion had a right to have the estate settled and closed.

It is urged that the proofs did not show that there were not unreleased mortgages and trust deeds. The

proofs do show that all the notes secured by any trust deeds or mortgages had been sold and assigned so that the estate had no further interest in them. Whether any of these notes remained unpaid or were not yet due, the mortgages and trust deeds, if any, securing them could be properly released of record when the same were paid. An assignment of a promissory note secured by mortgage, also assigns the mortgage and could be released by the assignee. If it should become necessary to release a trust deed not yet due, a Court of equity would readily appoint a trustee for that purpose.

In the case of **Warnecke v. Lambca**, 71 Ill. 91, the facts shown were that one Rauscher was named as trustee under a trust deed to secure the payment of certain promissory notes. The trust deed provided that in default of the payment of the notes secured, or any part thereof, on application of the legal holder, "John Rauscher, or his legal representative," should advertise, sell and convey the land as the attorney of the grantor. Rauscher, the trustee, died and the sale was made by his widow as administratrix of his estate. Upon a bill to redeem the land on the ground that the widow

and administratrix of the deceased trustee had no power to make the sale, the Court held: "The general rule is, the trustee must himself execute the power, and if, by reason of death or incapacity, he cannot do it, relief can only be had on application to a court of chancery to appoint a trustee to execute the residue of the power. ***** "The legal title to the real estate covered by the trustee deed was in the trustee. It did not descend to the administratrix, and how could she convey that which she did not have? She was in no way connected with the title that was in the trustee, but was a stranger to it. She could not convey in the name of the trustee, for he was dead; nor could she convey in the name of the grantor, or her own name, for no such power was given. ***** . "It is agreeable to the analogies of the law that the assignee or grantee having the legal title that was in the trustee can execute the power, but it involves an absurdity to say a mere stranger to the title can. This is the doctrine of the cases of **Pardee v. Lindley**, 31 Ill. 174, and **Strother v. Law**, 54 Ill. 413. The principle of those cases is, that, where the mortgagee of his assignee is empowered to sell on

default being made, if the indebtedness thereby secured is assignable at common law, or by our statute, the assignee is the only party who can execute the power. It is for the reason the assignee is the legal holder of the indebtedness, and the assignment carried with it the mortgage as the mere incident. *****

“Therefore, there was no one who could rightfully make the sale. A new trustee should have been appointed to execute the power, or the trust deed should have been foreclosed by bill in chancery as an ordinary mortgage.”

There was no necessity for keeping this estate open for an undetermined number of years in order to accommodate the grantors in the mortgages and trust deeds, if any there were, by releasing the same upon the record, so that it became immaterial whether the proofs showed there were any such unreleased mortgages or trust deeds. It is also urged by appellant that the hearing in the Circuit Court on the appeal thereto from the County Court was a trial *de novo* and that the Circuit Court should have entered a complete order of distribution. In this, we think the contention of appellant is correct. On an appeal from the County Court in probate matters to the Circuit Court,

the latter Court should enter a complete judgment and not simply direct further procedure in the Probate Court. Under the statute, the trial in the Circuit Court under such circumstances is a trial **de novo** and a complete judgment should be entered therein in regard to the matter appealed from. For this reason the judgment of the Circuit Court is reversed and the cause remanded with directions to enter a proper order of distribution and for the closing of the estate. Each party will pay its own costs in this Court.

Abst

Filed Feb 3 - 1930

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256 I.A. 613²

General No. 8354

Agenda No. 15

OCTOBER TERM, A. D. 1929

A. M. Myers, W. H. Drewell, et al, Appellants,
vs.

John M. Gerhardt, Appellee

Appeal from Circuit Court Coles County.

ELDREDGE P. J.

The second amended bill in this case charges that Myers and Drewell were partners, prior to January 7, 1927, in manufacturing trunks and carriers to be attached to automobiles; that John M. Gerhardt was in their employment and working at making the attachments; that it was necessary to adjust each trunk to automobiles by separate attachments; that Myers and Drewell afterwards incorporated as Myers Manufacturing Co.; that prior to the contract entered into Gerhardt represented to Myers and Drewell that he had invented a device which would, without alteration, enable the attachment of trunks to at least fifteen different styles of automobiles, without alteration; that they entered into negotiations with Gerhardt; that they did not know whether the invention was valuable or not; that Gerhardt represented that it would do this and probably as many as twenty-five that from the plans they could not tell

as to its usefulness, nor how it would succeed; that they executed the contract relying upon what he stated to them; that in the contract they were to pay him a royalty of twenty-five cents on each device until the first year; that the contract was in fact contingent on it working as represented; that the device would not work; that Gerhardt had invented no such device; that what he had was worthless; that he advanced him monies to demonstrate that it would work but that he finally abandoned the attempt; that Gerhardt had invented no device and the contract should be reformed or if not it should be rescinded; that Gerhardt made a warranty that the device would do what he claimed, which was by mistake of the parties not incorporated in contract; that certain stock was issued to Gerhardt in pursuance of said contract; that proceedings on the cross bill filed by Gerhardt should be restrained until a hearing was had on the original bill.

Subsequently the second amended bill was amended by setting out that Gerhardt falsely represented that the device would enable the attachment of the trunks to at least fifteen kinds of cars without change; that they relied upon the representations and were deceived thereby, and he was their

employee and occupied a confidential relation.

The contract is as follows: "THIS CONTRACT AND AGREEMENT made and entered into this the 7th day of JANUARY A. D. 1927, by and between A. M. Myers and W. H. Drewel, parties of the first part, doing business under the firm name and style of Myers Manufacturing Company of Charleston, Illinois, and John M. Gerhardt, of Charleston, Illinois, party of the second part.

WITNESSETH: THAT WHEREAS, the party of the second part has heretofore invented an appliance known and named the UNIVERSAL TRUNK PLATFORM AND BUMPER CONNECTION, to be used in installing and attaching auto trunks, bumpers and luggage carriers to automobiles; AND WHEREAS, the said party of the second part has applied to the United States Government and Patent authorities thereof, for a patent thereon, by filing with said authorities the necessary papers and applications to obtain a patent upon said Universal Trunk Platform and Bumper connection and has heretofore done all things to this date that are necessary for procuring a patent upon said connection; AND WHEREAS, it will be some time under the usual process and procedure of the United States Government authorities in granting patents, before said patent will be granted to the party of the second part; AND WHEREAS, the parties of the first part desire to procure the exclusive right to manufacture and sell said bumper connection and attachment from the present time thence forth and to receive from said party of the second part a transfer and assignment of said patent when the same shall be granted unto him by the United States Government, as aforesaid.

In consideration of the foregoing premises and covenants and agreements hereinafter contained, the party of the second part does hereby contract and agree with the parties of the first part, that they shall have the exclusive right to manufacture and sell said Universal Trunk Platform and Bumper Connection, as aforesaid, from and after the date of this contract, and that upon the granting to him by United States Government of a patent thereon, he the said party of the second part will transfer all of his rights thereunder to the said parties of the first part, or the Myers Mfg. Co. Inc.

The parties of the first part, for and in consideration of the above agreement on the part of the party of the second part, do hereby CONTRACT AND AGREE to pay to the party of the second part, the said JOHN M. GERHARDT, or his successors or assigns, twenty-five cents (25c) on each one of said bumper connections, upon and for the exclusive right to manufacture and sell said bumper connections from the date hereof, and during the period that shall elapse before said patent is granted, to the party of the second part as aforesaid.

The said parties of the first part for the consideration aforesaid, do hereby contract and agree with said party of the second part, that if twenty-five cents on each of said bumper connections in any one year, beginning with the date of this contract, shall not equal the sum of TWENTY-FIVE HUNDRED DOLLARS (\$2500) per annum, that the parties of the first part shall pay to the party of the second part, at the end of each

year from the date hereof, his executors, administrators or assigns, a sum in addition to twenty-five (25c) on each one of said bumper connections, which taken in connection with said twenty-five cents (25c) and added thereto, shall equal the sum of TWENTY FIVE HUNDRED DOLLARS (\$2500.00) per annum. That if twenty-five cents (25c) each on said connections shall produce a sum per annum in excess of \$2500.00, second party is to receive the total thereof. In event that said 25c on each one of said bumper connections does not actually equal \$2500.00 in any one year, either party has the option to cancel this contract at the end of any year.

It is further contracted and agreed between the parties hereto, that the parties of the first part for the considerations herein contained, do hereby sell, set over, and transfer to the party of second part an undivided 3-100th of all property, machinery, leasehold interest, and equipment of every kind and of character, now owned and possessed by the parties of the first part and by them now being operated under the firm name and style of the MYERS MANUFACTURING COMPANY.

It is further contracted and agreed that in the event that a corporation shall be organized by the parties hereto, for the purpose of operating the business now known and conducted under the name and style of the MYERS MANUFACTURING COMPANY, for the manufacture and sale of automobile trunks and attachments thereto, that shares of stock in said corporation, when so organized, shall be issued to said JOHN M. GERHARDT, for and in consideration of his undivided 3-100th interest in the property above mentioned, and said stock shall be delivered to him by the parties of the first part.

It is further contracted and agreed that an accounting shall be taken between the parties hereto, and payment made of the amount due the party of the second part, for the manufacture and sale of said bumper connection as hereinbefore provided on the first day of each month hereafter, beginning on the first day of FEBRUARY A. D. 1927.

It is further agreed between the parties hereto, that the party of the second part shall have access to all the sales records, and all necessary papers pertaining to sales and orders of the parties of the first part or their successors, to determine the amount due him under the agreement aforesaid, and that he may have access to said books, memoranda, and all necessary papers, invoices and orders of the parties of the first part pertaining to sales, or their successors, to be examined by an expert accountant, at any time during business hours, for the purpose of arriving at the amount that shall be due him, the said party of the second part, on the first day of any month, and at the end of any year from the date hereof.

IN WITNESS WHEREOF the parties hereto have set their hands and affixed their seals, this the day and year first above written.

| | |
|------------------|--------|
| MYERS MFG. CO. | (Seal) |
| A. M. MYERS | (Seal) |
| W. H. DREWEL | (Seal) |
| JOHN M. GERHARDT | (Seal) |

WITNESSES:
THOS. J. LYNCH,
LULA E. COX.

Appellee had prayed in his answer that the same might stand as a cross bill and the hearing was had upon the second amended original bill as amended and answer thereto and upon the cross bill and answer thereto and replications to said answers.

By his cross bill, Gerhardt, appellee, admits the partnership of Myers and Drewell and that he was an employee and familiar with the conditions existing in connection with making and marketing the luggage carrier, and it was necessary to adjust each trunk to each automobile by separate methods. He also admits that he represented to Myers and Drewell, prior to the execution of the contract, that he had invented a device which would enable trunks to be attached to various makes of automobiles, without change, and that negotiations between him and said firm were entered into to obtain the rights to use the invention. It is further averred in the cross bill that appellants were familiar with all the work that he was doing and were fully informed by him prior to the execution of the contract; denies that he represented that the device would fit fifteen different types of automobiles, but avers that he perfected models of the invention which would enable the

attachment of trunks to fourteen different kinds of automobiles, and that these experiments were conducted prior to the execution of the contract; avers that all parties acted in good faith and believed the invention would be suitable and practicable; that appellants agreed to transfer 1-300th of their assets to Gerhardt; also agreed to pay him a royalty of twenty-five cents on each device, so invented, for the exclusive right to manufacture and sell the same during the period that would elapse, before the patent was issued, and guaranteed it would be \$2,500.00 per annum; denies that he made any representations or warranties as to what the invention would do; that appellants had plans and specifications for same and knew all the facts; that he did invent the device and that letters patent were issued to him therefor; denies all mistakes of fact; avers the device served the purpose intended, and that he has a patent for the invention which he is ready to assign to appellants; says matter was fully investigated by appellants and they had all the facts; denies he made experiments and abandoned attempts or that there was any condition as to the payment of the \$2,500.00; avers there was no warranty; that he obtained the stock from appellants and all but ten shares thereof

had been transferred or assigned by him. Appellants filed an answer to the cross bill which was several times amended and which in substance denied every affirmative averment therein and averred that it was understood that Gerhardts warranted the patent which was valid and that it would do what it purported to do but on attempt was unable to do so and the device was useless; that even after all parties believed that the device was a successful patent that there was a mistake of fact, and if Gerhardts did not believe so there was a fraud, and that the consideration failed and that Gerhardts occupied a confidential relation and appellants had a right to rely on his statements; that the consideration of the contract wholly failed, that the device was of no value and not subject to a patent, and the whole consideration of the contract failed as the patent was wholly void and it would be inequitable to allow Gerhardts to recover on the contract.

The hearing was had before the Court who entered a decree dismissing the original bill for want of equity, ordering appellants to pay the sum of \$2,500.00 to appellee and that appellee was entitled to an accounting of royalties due him under said contract. The decree further makes special

findings in substance as follows: that said contract was not entered into between the parties upon any mistake of fact or upon the belief in the existence of an invention which did not exist; that appellants had all the information concerning said proposed invention which appellee had; the contract was not entered into by appellants by reason of any false or fraudulent representations made to them by appellee that said proposed invention would enable trunks or baggage carriers to be attached to at least fifteen different styles of automobiles; that appellee made no representations falsely or fraudulently with the intent to deceive appellants and that appellants did not rely upon any statements of appellee and were not deceived thereby; that the position of appellee with appellants at the time said contract was entered into was not such that they had a right to rely upon the representations of appellee with reference to said proposed invention and that appellants were not without means of knowing anything to the contrary as to said representation, if any, made by appellee; that it was not the intention of the parties that a warranty should have been written into the contract that said invention or device would enable appellants to attach auto trunks which

they were manufacturing to at least fifteen different styles of automobiles without alteration; that such a warranty was not omitted by a mutual mistake of the parties; that there is no evidence that the contract was made upon a condition that the payments were to have been made as the device was manufactured; and there is no evidence that the contract between the parties was that the payment of the royalties and the \$2,500.00 a year were only to be paid upon condition that the device, or proposed invention, would enable trunks or baggage carriers to be attached to at least fifteen different styles of automobile bodies in accordance with representations of appellee to that effect; that there was no mutual mistake of the parties to the contract by which the contract should be made to read that said \$2,500.00 minimum per year was to be paid only if the device was in accordance with representations made by appellee; that pursuant to said contract, the said Myers Manufacturing Co., was incorporated prior to March 18, 1927 and did on said day issue to appellee or to persons whom he directed sixty shares of the capital stock of said corporation and that upon the issuance of said stock, appellee, to further carry out said contract, executed and delivered to

said corporation an assignment of his rights under any patent to be obtained for said device; that the United States issued letters patent for said device to appellee June 12, 1928; that said Myers Manufacturing Co. has refused to make any payments to appellee under said contract; that appellee has made demands upon said company and the said Myers and Drewell for payments due him upon said contract and that such payments were refused; that said contract was cancelled on January 7, 1928 by reason of the refusal of appellants to make payments thereunder or thereon; that appellee is entitled to the sum of \$2,500.00 but that there is no evidence to show that he is entitled under said contract to any amount in excess of said sum as provided by said contract and that judgment for said sum be entered and that execution be issued therefor.

The principle contention made by counsel for appellants in this Court is that the patent obtained is void and useless. This Court has no jurisdiction to pass upon the validity of patents issued by the United States Government. As to the question of its usefulness, or whether it is of practicable value, or whether the device can be constructed thereunder which is practicable, in no place in the contract is the validity

of the same made dependant upon these considerations. While the evidence for appellants tends to show that about fifty of these attachments made under the patent by them were returned to them by their customers, yet, there is evidence introduced by appellee that said attachments or devices had been set to eighteen different makes of automobiles and appellee himself testified that he has seen them attached to at least fourteen different makes and other witnesses testified to their having been attached to a number of different kinds of automobiles. There is no evidence tending to show any fraud or misrepresentation of any kind made by appellee to appellants to induce them to sign the contract. It is apparent that they believed that appellee had invented and could get a patent for a useful device and it is apparent that appellee believed the same. The fact that a patent was issued to him shows presumptively that the patent was valid, practicable and useful.

There is no evidence to sustain the contention of appellants that the parties made a mutual mistake in omitting a warranty on the part of appellee from the contract. This contract was originally drawn up by attorneys for appellants and submitted to appellee who examined the same and submitted it

to his attorney. Some objections were made to the original contract and as a result of consultation between the parties and their attorneys the contract in question was formulated and executed. There is no evidence that the question of warranty was ever mentioned or discussed between the parties. The contract is very plain and speaks for itself.

Counsel for appellants in their brief say: "The main purpose of this appeal is to reverse the decree for an accounting, while the Court also dismissed the original bill that has become of no great importance." The same facts relied upon under the original bill are relied upon in the answer of appellants to the cross bill.

The evidence introduced does not sustain the original bill but does sustain the cross bill and the decree entered by the Chancellor.

The decree of the Circuit Court of Coles County is affirmed.

Abot

Filed Feb 3 - 1930

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256 I.A. 613³

General No. 8361

Agenda No. 21

OCTOBER TERM, A. D. 1929

THE RANKIN-WHITMAN STATE BANK,

Appellant,

vs.

JAMES MULCAHEY, et al., Appellees.

Appeal from the Circuit Court of Vermilion County
ELDREDGE, P. J.

This is an appeal from a decretal order entered upon a hearing upon an intervening petition filed by Nellie Abbott in a foreclosure suit brought by the Rankin-Whitman State Bank vs. James Mulcahey, et al.

On July 11, 1923 James Mulcahey was the owner of certain farm lands in Vermilion County and was indebted to appellant bank in the sum of \$13,000.00 in evidence of which he executed certain promissory notes for the above amount and also a trust deed conveying said lands to secure the same. This trust deed was subject to two prior trust deeds given to secure other indebtedness aggregating \$29,000.00. On March 19, 1926 before any default in the payment of principal or interest under said junior trust deed had taken place, Mulcahey by a warranty deed executed by him conveyed for a valuable consideration the real estate described in the trust

deed to his mother, Mary Mulcahey. On March 22, 1926 Mary Mulchaey executed a written lease to said James Mulcahey for the same lands for a period from March 22, 1926 to the first day of March 1927 in consideration of a cash rental of \$5.00 per acre for the grass and pasture land and one half of all the crops raised on said premises to be delivered at an elevator in the neighborhood. James Mulcahey entered into the possession of said premises under said lease and farmed the same as a tenant of said Mary Mulcahey during the period covered by said lease. On September 22, 1926, appellant filed its bill to foreclose its junior trust deed and a decree of foreclosure was entered October 14, 1926. The premises were sold thereunder November 15, 1926 and appellant became the purchaser at said foreclosure sale. On November 18, 1926 a deficiency judgment against James Mulcahey was rendered in the sum of \$4,097.70. Previous to this date, on October 14, 1926, E. H. Whitham had been appointed receiver of the lands involved in the foreclosure proceeding with full power to collect the rents, issues and profits arising out of said lands during the pendency of the foreclosure proceeding. On November 30, 1926 said Whitham as

receiver executed a lease in writing to James Mulcahey for the premises for a period from March 1, 1927 to February 15, 1928 on the same terms of rental as were embraced in the previous lease from Mary Mulcahey to James Mulcahey. James Mulcahey as tenant of Mary Mulcahey raised a crop of corn on said lands which had matured and was standing in the field but not gathered at the time of the foreclosure sale but which was afterwards gathered and placed in a crib on said premises and was in said crib on June 7, 1927 and in the possession of James Mulcahey. On June 7, 1927 James Mulcahey being indebted to his sister, Nellie Abbott, in the sum of \$15,000.00 executed his note for that amount and to secure the payment of which he also executed and delivery a chattel mortgage to her on one half of all corn in the crib heretofore mentioned. This mortgage was duly recorded in the office of the recorder of deeds of Vermilion County. On July 6, 1927 Nellie Abbott caused said mortgage to be foreclosed and the same was sold under said foreclosure on July 9, 1927 and she became the purchaser of said corn for the sum of \$1,757.66. On the same day, July 9, 1927, the receiver caused all the corn in said crib consisting of 3,863 bushels and 12 pounds to be delivered

and sold at the elevator at Rankin, Illinois at \$.84 per bushel making a total amount received by the receiver for said corn the sum of \$3,245.10, one half of which would be \$1,622.55. Thereafter Nellie Abbott filed her petition in said cause for the purpose of having the Court order the receiver to pay her one half of the proceeds received by him from the sale of the corn. This petition is variously called by the parties as a supplemental bill and an original bill but its proper designation is that of intervening petition.

One of the terms of the lease under which James Mulcahey operated the farm as a tenant was that he should pay for the husking and selling of said corn but it appears that the receiver assumed this expense which was \$588.55. The Chancellor, therefore, deducted this amount from the sum of \$1,622.55 and ordered the balance, \$1,034.00, to be paid to the petitioner, Nellie Abbott.

Appellant contends that the corn crop of 1926, which is all that is involved in this controversy, was growing and unsevered on said lands when the lands were sold under the decree for foreclosure and was a part of the freehold and passed to the purchaser the same as any other part of

the land subject only to the right of redemption which was never exercised; that the land was sold without any reservation of the unsevered crops growing thereon and that the sale discharged it from any or all right, interest or claim thereto of any or every party in the suit; that James Mulcahey had previously conveyed his equity of redemption and every right, interest and claim he had in the land including the unsevered crops then growing thereon; and that the receiver during the entire redemption period and possession of the lands and under the deficiency decree his possession inured to the benefit of the purchaser at the mortgage sale. Counsel for appellant are in error in these contentions. James Mulcahey before any default in the trust deed had taken place conveyed by warranty deed to his mother all his right, title and interest in the premises mortgaged, and Mary Mulcahey became the owner of said premises subject to said mortgage incumbrance. As such owner she had a right to lease these lands to James Mulcahey or to anyone else. James Mulcahey had a right to rent the lands from his mother and farm them as her tenant or rent any lands from anyone else that he desired. His lease from his mother,

Marv Mulcahey, was executed before any bill for foreclosure was filed. If he was such tenant when the bill was filed, then it was the duty of appellant to make him a party to the suit and set up his interests as such tenant. The half of the crops raised by him as such tenant became his property absolutely. The receiver could only take rightful possession of that part of the crop raised which was the rent for the land and this he obtained. The fact that a deficiency decree was entered gave the receiver no right to take possession or sell the personal property of James Mulcahey as it could not become a lien thereon without the issuance of an execution. The purchaser at the foreclosure sale acquired no title to the personal property of James Mulcahey which he had acquired by the terms of his contract of leasing. It follows, therefore, that James Mulcahey being the lawful owner of one half of the corn raised by him as such tenant had a right to execute the chattel mortgage to secure a debt owing to the petitioner, Nellie Abbott, and she by foreclosing said mortgage and purchasing the corn at the foreclosure sale became the owner thereof subject to the expense of harvesting the same paid by the

receiver.

The decree of the Circuit Court is affirmed.
Affirmed.

back. Opinion filed Feb 3 - 1930
Rehearing denied April 4 - 1930

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256 I.A. 613⁴

General No. 8370

Agenda No. 28

OCTOBER TERM, A. D. 1929

Clarence Wyer, Appellee,

vs.

Emil A. Ekstrand, Appellant.

Appeal from Circuit Court of Champaign County

ELDREDGE P. J.

Clarence Wyer, appellee, procured a judgment in the Circuit Court of Champaign county against Emil A. Ekstrand, appellant in the sum of \$2000 in an action on the case brought to recover damages for personal injuries received on account of a collision with appellant's automobile on state road, Route No. 1 in the City of Georgetown, Vermilion County, on May 26, 1928 at about 7:00 o'clock A. M.

The declaration originally consisted of four counts and subsequently an additional count was filed. All the counts were amended and at the close of the evidence on behalf of the plaintiff on motion of the defendant the evidence was excluded as to the third and the additional count and the case went to the jury upon the first, second and fourth counts of the original declaration as amended. In the first amended count, it is charged that plaintiff on the 26th day of May 1928

was lawfully crossing a certain public street in an easterly direction in the City of Georgetown, Vermilion County, known as State Road No. 1 exercising due care and caution for his own safety and the safety of others and the defendant was then and there in possession of and was driving a certain automobile from the north to the south along said highway, and it was the duty of said defendant in the management and control of said automobile to observe a proper regard for the safety of others, and to exercise due care and caution in the operation of his automobile, yet, the defendant so carelessly, negligently and improperly managed and operated said automobile, that by reason thereof the said automobile was driven from the north to the south along said public highway colliding with the plaintiff who was then and there crossing said street from a westerly to an easterly direction and thereupon the plaintiff was struck by the automobile so driven as aforesaid, knocked down upon the pavement and greatly injured; that he incurred hospital expense in the sum of \$146.00, Doctor's bills in the sum of \$300.00 and ambulance service in the sum of \$10.00.

In the second count after the preliminary averments,

as set out in the first count, it is charged that it was the duty of defendant to so operate his automobile being driven by him at the time and place in question so as not to injure pedestrians crossing the street on which he was driving, yet, the defendant negligently and carelessly drove his car in a southerly direction upon and along State Road No. 1 and at the place aforesaid, the same being a closely built up business portion of said City of Georgetown, at a rate of speed exceeding 10 miles an hour as provided by statute, and at, to-wit, a high and dangerous rate of speed, to-wit, 30 miles per hour and at and against the said plaintiff etc.

In the fourth count, it is charged that it was the duty of the defendant to give warning of his approach and to use every reasonable precaution to avoid injuring the plaintiff, yet the defendant carelessly and negligently failed to give any warning of his approach and failed to use any reasonable precaution to avoid injuring the plaintiff.

On the morning of the accident, the plaintiff, who was a coal hoisting engineer, was proceeding to his work in an automobile of his own. In his car with him were four young ladies. While he was proceeding along Route No. 1 in a

northerly direction on the east side of the street, he stopped his car in about the center of the block between Eighth and Ninth Streets and opposite a greenhouse conducted by the witness Burgoyne located on the west side of the street. He descended from his car and crossed the street to the greenhouse where he talked for a few minutes with Burgoyne. He then turned and proceeded to recross the street in an easterly direction to his own car. He had taken but a step or two from the curbing when he was hit by the defendant's car which was proceeding in a southerly direction within two feet of the west curbing. The street north of the greenhouse bends slightly in a northeasterly direction. Inside the curb and four or five feet west therefrom and north of the greenhouse are three large maple trees and in front of the greenhouse is a telephone pole just inside the curb and about two feet north of where the plaintiff stood before he attempted to recross the street to his car. The nearest maple tree was 25 to 30 feet north of him at that time. The west side of the sidewalk running north and south in front of the greenhouse was about three feet therefrom. From the east side of the sidewalk to the curb line or pavement was a

distance of 11 or 12 feet. The plaintiff testified on direct examination in substance as follows: "I got out of my car and went across the street to the greenhouse run by Royal Burgoyne. I stayed there probably 3 or 4 minutes. As I left there I went directly toward my car which was across the street. I walked out a little ways from the greenhouse and stopped. I looked to the right and left, went down to the curb and looked—at that time I looked to the right and to the left and I saw some north-bound traffic; saw nothing south-bound; that was to my left. I saw a small Ford car going to the south to my right; a wagon and two cars coming north were all; everything that I saw was to my right. The car going south was about 300 feet from me, and of the north-bound cars, the head one was a wagon and a car immediately behind the wagon on which my attention was fixed first. The last recollection I had was stepping off of the curb or stepping on the curb and stepping off and after that I had no recollection on that morning." On cross examination, he testified in substance as follows: "I don't remember how I came out of the store that morning, whether I was walking rapidly or slowly. I think I was walking slowly, will say medium speed. I looked.

north and south as I came out of the store after I crossed the sidewalk, I would say I was about 10 feet from the curb line when I looked north. The boughs of those trees hanging low constructed my view from seeing any great distance. As I remember about that time some limbs or branches were hanging low and in driving under them would scratch the top of my car. I looked north again before I stepped onto the pavement. When I looked north the last time I was on the curb. A large telephone pole or light pole just inside the curb a couple of feet north of where I stood obstructed my view so I could not see up the road. I stepped out on the pavement without knowing whether there was a car coming from the north or not. I did not look north any more but stepped out on to the pavement and took one or two steps and remember nothing after that."

It is apparent that if the plaintiff had in fact looked to the north before he stepped off the curb he could not have failed to have seen the defendant's car. The telephone pole inside the curb could not have been sufficient to have obstructed his view of an approaching car, but if it had, it was then his duty to look around the pole. The maple

trees were 40 or 50 feet north of him and just beyond the trees the street swerved to the northeast and this curve in the street aided his view rather than obstructed it. There was very little traffic on the street at the time and all the south-bound cars that he saw were south of him and the northbound cars that he saw were on the opposite side of the street going north.

The witness Swank at the time of the accident was driving a team of horses hitched to a wagon going north along the east side of the street. He testified in substance: "I observed the accident or collision that morning about 150 feet north of me on the west side of the street. A man hit Mr. Wyer with an automobile. The first I noticed the car was when I heard the crash. When I looked up, Mr. Wyer was clear above the top of the car when I heard the crash; his feet was up highest and looked like he fell right down at the side of the car. His feet pointed up; looked like it just whirled him right over; he was up in the air; he was whirling over the front part of the car, over the top. Why, yes, of course I would have an opinion if I would see a car going along, about how fast I thought he was going. As

to this car I wouldn't want to say I had an opinion, for this reason: I did not see the car until it hit him. I have an opinion as to the speed of the car immediately after I saw it, after the collision; I think it must have been going 35, something like that from the distance he went after he hit him to where he stopped. The car stopped opposite to where I stopped my horses. When he stopped the car, he got out and I heard him talking. He says, 'Why, my God, where did he come from?' He says, 'I didn't see the man; I didn't see him at all; where did he come from anyhow; I didn't see nobody.' The man's body was laying right at the edge of the street when I saw him, on the curbing right by the sidewalk, part of him was lying on the pavement. I didn't go over to him at all. I never got out of my wagon."

The witness Paxton testified that he was sitting in front of his place of business on the corner of Eighth and Main Streets at the time of the accident, on the east side, across from the grechthouse; saw the car that was being driven south before he heard the collision. Observed the car about 150 feet north of the collision and until it came within about 50 feet of the collision. It is his opinion that the car was going between 30 and 35 miles. The first

thing he saw after he heard the impact was Mr. Wyer above the top of the car from his waistline down. His feet were pointed straight up. His body dropped straight onto the concrete on his right shoulder and was lying crosswise of the street with his head to the curb about a foot away. The automobile was about 6 feet from the west curb at the time of the accident. 'That is my signature to the papers shown me marked Exhibit A. I said he started running when he started out of the greenhouse. Don't think I said Wyer started across Main Street without looking north or south nor that I said, 'Mr. Wyer was near the middle of the block. There is no street crossing there and I saw him coming out of the flower store. He turned in a hurry and started out. You might call it running or might call it a fast walk. To me it looked as though the fellow was in the act of running as he turned. I did not see him look any direction when he turned inside the greenhouse.' 'He also testified that the glass on the right side of the car was broken; that he went down and examined the car and found a piece of scalp on the hinge and some hair with it, it was the top hinge on the door on the right hand side as you go south, the front door.

The witness Burgoyne, who ran the greenhouse, stated that the plaintiff came to the greenhouse that morning and paid him a small sum of money and further testified in substance: "When Mr. Wyer walked away that morning he walked to the curbing and hesitated there. He said something about the time he got to the curbing, and I did not see him step off the curbing. He was standing on the curbing when I closed the door. Leaning around the telephone pole and those trees a man could see up the street standing on the curb line for at least 200 feet."

The witness Bennett, a boy of 14 years of age, testified that he saw defendant's car that morning a block away from the accident going south and at that time was running 35 miles per hour.

Miss Flossie Rector testified that on the morning of the accident she was working in the witness Paxton's store; that when she first saw defendant's car it was 200 feet from the greenhouse going south and running about 35 miles per hour. She further testified in substance, "I observed Mr. Wyer just before the accident coming out of the greenhouse. I would say he was coming out in a slow trot."

I observed him after he left the greenhouse. He walked down to the curb, and stood there just an instant, and that is the last I saw him until the accident. I could not say whether he was looking in either direction at the time I saw him. I heard the impact but did not see the accident. I was across the street from the greenhouse and saw Mr. Wyer coming away from the greenhouse in a trot. I believe I made the statement signed by me that Wyer did not look either north or south as he started across the street."

Miss Sophia Valhovitch testified that she was one of the women in the plaintiff's car which was parked across the street opposite the greenhouse and that plaintiff just took two steps off of where he was coming from the greenhouse and the car hit him, knocked him a few feet over the radiator, right over the top, and landed down on his head. "I observed the man driving the car south just before the accident; he was looking at Wyer's car. Three other girls were in his car with me. Their names were Minnie Tintorri, Catherine Tintorri and Miss Miller. None of us were related to Mr. Wyer. I was in the back seat of his automobile. It had curtains on. I looked through the side, the curtains on the side of the car,

when I saw the defendant's car. There were celluloid window glasses in the curtains. Mr. Wyer was walking towards the car at the time the collision happened. He walked about two feet on the pavement when the accident happened. He looked north and south just before he stepped onto the pavement. I was half a block north of the greenhouse." The above was all the testimony introduced on behalf of the plaintiff in regard to the facts surrounding the accident.

The defendant testified that he lived in Ludlow, Champaign County, Illinois and is 68 years of age; that on the day of the accident he started in an automobile with his wife for Terra Haute, Indiana; that as he approached Georgetown he looked at his speedometer and saw it was running at the rate of 25 miles an hour and then decreased his speed; that he had driven an automobile nearly every day for 15 years and at the time of the accident his opinion was that he was not driving over 20 miles an hour; that his first knowledge of the accident was when he heard his wife scream and heard the crash of the glass on the right hand side in the right front automobile door; that the glass came into the car; that he applied the brakes as hard as he could and swerved the car

to the left and then he released the brakes and went to the right; let the car coast down a little further and then stopped; that he immediately ran back to where the accident had happened and found a body on the pavement close to the curb probably a foot from the curb opposite the door of the greenhouse or nearly so; that he did not tell the witness Swank or the boy that testified, "I saw the car across the street. I was watching the car across the street." He further testified, "I was looking straight ahead; taking in both sides for that matter. I never saw this man, the plaintiff here, until after I heard the crash of the glass and saw him on the pavement. That was after the accident." The witness Burgoyne testified to the fact that the glass in the right front door was broken and there was blood on the sill of the window. The witness Ellis also testified as to the broken front window in the car and that he saw hair or pieces of scalp on the front door. The evidence conclusively shows that plaintiff was struck by the side of the car.

While the plaintiff had a legal right to cross the street which was a state highway in the middle of the block, yet, it was his duty to use such care as an ordinarily

prudent person would reasonably have used in doing so and commensurate with the known danger. It is self evident that if he had looked toward the north, he could have seen the defendant's car approaching. Of course, he could not look through the telephone pole but if the telephone pole, which was right beside him, obstructed his view, it was his duty to look around it. Furthermore the telephone pole was two feet back of the curb and if he had looked when he reached the curb it could not have obstructed his view. Under the circumstances, defendant's car would have collided with him as readily if it had been going but 10 miles per hour. Even if defendant's car had been going at the rate of 35 miles per hour, the evidence shows the road was perfectly clear before him and there was nothing to indicate that anybody would step out from behind a telephone pole in front of his car in the middle of the block or walk into the side of it as, the evidence conclusively shows, the plaintiff did in this case.

In the case of **Greenwald v. B. & O. R. R. Co.**, 332 Ill. 627, the Supreme Court is sustaining the action of the trial court in directing a verdict to find the defendant not guilty, said, "The rule has long been settled in this

State that it is the duty of persons about to cross a railroad track to look about them and see if there is danger, and not to go recklessly upon the track but to take proper precaution to avoid accident. It is generally recognized that railroad crossings are dangerous places, and one crossing the same must approach the track with the amount of care commensurate with the known danger, and when a traveler on a public highway fails to use ordinary precaution while driving over a railroad crossing, the general knowledge and experience of mankind condemns such conduct as negligence. (*Graham v. Hagmann*, 270 Ill. 252; *Lake Shore and Michigan Southern Railroad Co. v. Hart*, 87 id. 529; *Chicago, Burlington and Quincy Railroad Co. v. Damerell*, 81 id. 450; *Toledo, Wabash and Western Railway Co. v. Jones*, 76 id. 311.) One who has an unobstructed view of an approaching train is not justified in closing his eyes or failing to look, or in crossing a railroad track in reliance upon the assumption that a bell will be rung or a whistle sounded. No one can assume that there will not be a violation of the law or negligence of others and then offer such assumption as an excuse for failure to exercise care. The law will not tolerate the absurdity of allowing a person

to testify that he looked but did not see the train when the view was not obstructed, and where, if he had properly exercised his sight, he must have seen it. (**Schlauder v. Chicago and Southern Traction Co.**, 253 Ill. 154.)”

Under the facts, it was important that the jury should have been accurately instructed. The first instruction given on behalf of the plaintiff is as follows: “The Court instructs the jury that if you believe from the preponderance of the evidence, that at the time of the accident in question, the defendant was proceeding in a motor vehicle within the residential portion of the City of Georgetown, at a rate of speed greater than fifteen miles per hour, and if you further believe that such rate of speed was greater than was reasonable and proper, having regard to the traffic and use of the way, or such as to endanger the life, limb or property of other persons lawfully on said highway, then, and in that case you should find that the defendant was negligent.” This instruction while not in the exact language of the statute, yet is very misleading in that it inferentially informs the jury that a proper rate of speed would have been 15 miles per hour at the time and place in question

and that any other rate of speed greater than 15 miles per hour might be unreasonable and negligent.

The fourth instruction is as follows: "The Court instructs the jury that even though you may believe from the evidence that at the time of the accident in question, the plaintiff was crossing the street at a point other than a regular street crossing; that fact if true, did not relieve the defendant of his duty to use ordinary care to avoid injuring the plaintiff or other persons on the public highway, if you find from a preponderance of the evidence the defendant did not use such ordinary care." This instruction is also misleading as it wholly ignores the reciprocal duty of the plaintiff of also using due care.

The seventh instruction is as follows: "The Court instructs the jury on the issue as to whether or not the defendant was negligent, that if you believe from a preponderance of the evidence that the defendant knew or would have known by the exercise of ordinary care, the position of the plaintiff at and immediately prior to the accident, and in the exercise of ordinary care could have avoided the accident and that he did not exercise such care, then and

in that case, you should find that the defendant was negligent." There is no evidence tending to show that the defendant knew of the position of the plaintiff at and immediately prior to the accident, or by exercising ordinary care could have avoided the accident. The evidence conclusively shows that the plaintiff was hit almost instantly after he stepped onto the street and that he walked into the side of the car. It also omits any mention of the care necessary to be exercised by the plaintiff in attempting to cross the street.

The eighth instruction is as follows: "The Court instructs the jury that if from a preponderance of the evidence in this case, and under the instructions of the Court, the jury shall find the issues for the plaintiff, and that the plaintiff, Clarence Wyer, has sustained damages thereby, as charged, then to enable the jury to estimate the amount of such damages, it is not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jury may themselves make such estimate from the facts and circumstances in proof relating to the subject or the extent of the plaintiff's damages." Part of the damages proven were the hospital expense of plaintiff,

also the physician's fees and his expense for the ambulance. These were proven by direct testimony of witnesses and were also alleged in the declaration as part of the damages and the jury could only assess damages for these expenses in accordance with the evidence introduced, yet, under this instruction they were at liberty to assess damages therefor regardless of what the positive evidence thereof might be.

The judgment of the Circuit Court is reversed and the cause remanded.

last.

Filed Feb 3-1930

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256 I.A. 614'

General No. 8372

Agenda No. 30

OCTOBER TERM, A. D. 1929

Sarah McGowan, Appellee,

vs.

David N. Conwill, Appellant.

Appeal from Circuit Court, Sangamon County.

ELDRIDGE, P. J.

In April, 1924, Sarah McGowan, appellee, owned in fee simple a part of a certain lot in the City of Springfield. On the said date, David N. Conwill, appellant, and his wife were in possession, under a contract of purchase, of a part of an adjoining lot. The McGowan lot was vacant and unimproved. On the Conwill lot there was a small cottage consisting of three rooms in which Mr. and Mrs. Conwill and their four children resided. The contract for the purchase of the lot was executed by both Mr. and Mrs. Conwill and they had paid a large portion of the purchase price thereof. Mrs. Conwill is the granddaughter of Mrs. McGowan. Mrs. McGowan is a widow and at the time when the transactions involved in this case transpired was about 85 years of age. She went to live at the Conwill's home in January, 1924, and paid them \$6.00 a week for her room and board. She had previously lived at Ashland, Illinois, but had sold her home there in October, 1923,

for the sum of \$1,500.00, after which she lived with one of her daughters until she went to live with the Conwills. The three-room cottage being very small for the accommodation of seven people, Mrs. McGowan thought she would like to build a cottage on the lot she owned which adjoined the Conwill lot but found it would cost her more than her financial means permitted. Finally the Conwills agreed that Mrs. McGowan could build a three-room addition to the Conwill house for the personal use of herself. These rooms consisted of a bedroom, living room and a kitchenette. On January 12, 1924, Mrs. McGowan entered into a written contract with one L. B. Sargent to construct this addition to the Conwill house for the sum of \$1,645.00. Mrs. McGowan occupied these rooms until the 11th day of September, 1926, when she left them and again went to live with her daughter. In her bill of complaint she charges that as a part of the agreement entered into between her and Mr. Conwill it was understood that in addition to the rooms which she should have when such improvements should be completed she was also to be furnished with heat, light, water and use of the bathroom; that during the time she lived in said rooms she was not free to do as she wished, was not permitted to have friends and neighbors

call on her and visit with her when and as she desired such visits; that she was refused the use of heat, light, water and the bathroom as had been promised her; that she had been required to pay for services in and about her rooms which should have been taken care of or paid for by Conwill or his wife, and that in many other ways her stay at the home of the defendant was made unpleasant; that her health became impaired and she was subject to much annoyance, discomfort and insults on the part of the defendant and his family; and that on September 4, 1926, she was ordered by the defendant to leave said house as a result of which she did leave on September 11, 1926. In the answer of Conwill he avers that Mrs. McGowan left his home without cause and for no just reason; that during all the time she lived with him and in said rooms she was free to do as she wished, was permitted to have such friends and neighbors call on her and visit her as she desired and was not refused the use of heat, light, water and the use of the bathroom; that she was not required to pay for services in and about her rooms and quarters; that during the time she lived at his home he and his family made her welcome and her stay pleasant; denies that her health has become impaired on account of any unpleasant attentions

given her by himself or his family, that she was subject to any annoyance, discomfort and insults or that he at any time ordered her to leave said house. It is also averred in the answer that she is welcome to live in said improvements constructed on said property and to make her home there as she did prior to the time she left. In the answer it is further denied that he was desirous of making said improvements and avers that Mrs. McGowan proposed to build said improvements in order to have a place in which to live and that he gave his consent thereto.

The evidence strongly supports the idea that Mrs. McGowan was contented in her rooms until her daughter returned to Springfield and began to make trouble, the latter being provoked that her mother had not built a home of her own on her own lot so that she could live with her. Mrs. McGowan also owned an equity in another piece of property of the value of about \$500.00 and was receiving a pension of \$30.00 a month from the United States Government.

The bill asks for an accounting between appellant and appellee and that appellant repay her the amount she expended for the improvements.

The first contention of appellant is that equity has

no jurisdiction of the subject matter because appellee had a complete remedy at law in an action of assumpsit for the breach of the contract. The bill was not demurred to by appellant, nor did he insist in his answer that the bill was without equity nor was the jurisdiction of the Court questioned therein, but he submitted the issues to the jurisdiction of the Court.

If the subject matter of a Bill of Complaint is wholly foreign to the jurisdiction of a Court of Chancery then the Court will not grant the relief sought even though the defendant has submitted himself to the jurisdiction of the Court; but if the subject matter belongs to that class of which a Court will take jurisdiction when the facts create some equitable right or the relief of the parties renders the exercise of such jurisdiction proper, an objection that there was an adequate remedy at law must be taken advantage of at the earliest opportunity. **Law v. Ware**, 238 Ill. 360. In our opinion the case at bar comes within the latter class of cases. Appellant and appellee made no written contract as to the rights of the latter in the property of the former or as to the consideration which should pass from the former to the latter. The contract, if any,

rested in parole and it is apparent that there was a misunderstanding as to the rights and obligations of the parties thereto. Appellee had caused to be constructed and had paid for an addition to the house of appellant, the title to which, upon its completion, passed to appellant as a part of the real estate. Under such conditions in our opinion the Court of Chancery will take jurisdiction and adjust the equities between the parties. The Chancellor in the Court below charged appellant with the amount paid by appellee for the improvements and charged appellee a reasonable rental thereof while she occupied the same and ordered appellant to pay the difference to appellee. The title to the improvements became vested in appellant and he has the advantage thereof and the Chancellor adjusted the rights between the parties in the only way that it could be equitably done.

The decree provides that the balance ordered to be paid by appellee should become a lien upon the interest of appellant in the property and it is urged that this interest is not defined and therefore such order is erroneous. Appellant is in possession of the real estate under a contract of purchase which had not yet been fully paid and he had not received a

deed conveying title to him. If, in fact, the alleged lien established by the decree is for this reason void or unavailing, it is of advantage to appellant and he is not in a position to complain of that part of the decree.

The decree of the Circuit Court is affirmed.

abstract

Opinion filed Feb 3-1930
Rehearing denied April 2-1930

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256 I.A. 614²

General No. 8383

Agenda No. 36

OCTOBER TERM, A. D. 1929

SHAFFER OIL AND REFINING CO., Appellee,

vs.

NETTIE M. WEBB, Appellant.

Appeal from Circuit Court, Mason County.

ELDREDGE P. J.

On August 4, 1924 one Roy Gardner leased to the Shaffer Oil and Refining Co., appellee, a part of a lot (70x75 ft.) in Mason City, Mason County, for a period of four years for the sum of \$500.00 payable on the first day of each month in payments of \$10.00 each month, said premises to be used as a filling station. The lease also contains a provision that appellee may at its option renew said lease for an additional ten years beginning on the first day of October 1928 at a rental not to exceed \$15.00 per month and that appellee may remove the buildings and equipment from the ground at the expiration of the lease or its renewal. On October 9, 1924 Gardner and wife conveyed a part of said lot including the same property mentioned in the lease to Nettie M. Webb, appellant. Thereafter, at the request of Gardner, appellee paid the monthly rentals to appellant. This deed

contains a provision that it "is subject to the lease of the Shaffer Oil and Refining Co., dated August 1, 1924 given for four years with privilege of a ten year extension." On March 3, 1928 appellee made a written demand of appellant for the possession of the property covered by its lease, which, being refused, this suit for forcible entry and detainer was instituted by appellee before a Justice of the Peace to gain possession of the property. An appeal was taken by appellant to the Circuit Court of Mason County from the judgment of the Justice where the case was submitted to the Court for trial without jury, who after hearing the evidence rendered judgment in favor of appellee and ordered a writ of restitution. On the merits of the case the evidence is very meager and unsatisfactory. However, the following facts do appear: appellee dealt in gasoline, oils and like products usually sold at gasoline filling stations; immediately after the execution of the lease mentioned appellee constructed on said property concrete driveways, tanks and machinery, etc. necessary and usual for carrying on the sale of its products; that several different parties at different times operated this station presumably in the employ of appellee; in some way un-

explained by the evidence, appellant and her husband commenced operating this plant and purchased gasoline and other products sold therein from parties other than appellee.

It is apparent from the facts above that appellant purchased the property from Gardner subject to the lease of appellee and that she recognized the rights of appellee by receiving the rents therefor from it during the entire time. She is estopped by these acts from ousting appellee from the possession of the property. There is a provision in the lease that appellee shall not sublet said premises without the written consent of the party of the first part. It is claimed that appellee had violated this provision in the lease by subletting the property without appellant's consent to other parties, but there is no competent evidence or proof of any such subletting and the proof on the part of appellee is to the effect that it had never subletted said premises. Even if such subletting had been proven, according to appellant's own testimony she continued to accept the rent for the premises long after she had such knowledge, and, in fact, up to the time this suit was commenced, and would be held under such circumstances to

have waived this provision of the lease.

Counsel for appellant urges that the Court had no jurisdiction to order a writ of restitution because the lease had expired before the judgment was entered. The cause of action between the parties must be determined as of the date when the suit was instituted, and moreover, the lease provided that it could be renewed for a period of ten years at the option of appellee.

No propositions of law were submitted to the Court and no complaint is made of the Court's rulings on the admission or exclusion of evidence. There is no reversible error in the record and the judgment of the trial court is affirmed.

Abt.
Filed Feb. 3 - 1930

256 I.A. 614³

General No. 8336

Agenda No. 2

OCTOBER TERM, A. D. 1929

People of the State of Illinois, Defendant in Error,

vs.

Samuel Sincere, Plaintiff in Error.

Writ of Error from Vermilion County.

SHURTLEFF, J.

The plaintiff in error, hereinafter mentioned as defendant, was convicted under an information filed in the county court for an alleged violation of the Prohibition Act and fined three hundred dollars and costs, and sentenced to the county jail for ninety days.

The information contained three counts, charging: (1), unlawful possession of intoxicating liquor; (2), unlawful manufacture of intoxicating liquor, and (3), unlawful keeping for sale of intoxicating liquor, in violation of the Prohibition Act.

A jury was waived and evidence heard before the court.

The defendant, before the trial, made a motion to quash a purported search warrant and suppress evidence, supported by affidavit that all the information upon which the State contended for a conviction was procured by an unlawful search of the Saratoga Hotel in Danville, Illinois, of which the defendant was the owner and proprietor, and that said search was unlawful because made without the consent of the defendant, and without any valid search warrant.

Upon the motion to quash the search warrant and suppress evidence, it appears by the proofs that the warrant was issued upon a complaint in the following language:

"The complaint and affidavit of C. R. Harrier of Vermilion County, Illinois, made before Henry E. Brown, one of the Justices of the Peace (Police Magistrate) in and for said County on this 18th day of October, A. D. 1928, who being

first duly sworn upon his oath says: That he knows that intoxicating liquor containing more than one-half of one per cent of alcohol by volume is unlawfully possessed, kept for sale, sold and disposed of, for beverage purposes, in violation of the Illinois Prohibition Act of this State, and certain mash, still, implements, furniture and vehicles and other property designed for the illegal manufacture of the intoxicating liquor is possessed in, to-wit: One four story brick building located No. 8 South Hazel St., Danville, Illinois, County of Vermilion, used as a hotel, rooms 103 and 105 in said hotel also adjoining rooms on west side of room 105, the said premises being occupied by Samuel W. Sincere as a hotel in the County and State aforesaid; and that the following are the reasons, to-wit: Did purchase intoxicating liquor at said hotel."

The complaint does not state when or from whom the affiant purchased the liquor, and under the authority of **Hirschfield v. The People**, 241 Ill. App. 439, and **The People v. Prall**, 314 Ill. 518, we are constrained to hold that the affidavit was insufficient, and that the warrant should have been quashed and the evidence suppressed.

The record in this cause does not show that plaintiff in error was arraigned or entered any plea. The trial of plaintiff in error, therefore, was a nullity. (**People v. McCarthy**, 176 Ill. App. 499; **People v. Hughes**, 226 Ill. App. 135; **People v. Goff**, 211 Ill. App. 122, and **People v. Ayers**, 250 Ill. App. 529.)

It follows, therefore, that the finding and judgment of the County Court of Vermilion County should be, and is reversed and the cause remanded.

Appellant filed Feb 3-1930

Relinquency denied April 11-1930

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256 I.A. 614⁴

General No. 8363

Agenda No. 23

OCTOBER TERM, A. D. 1929

Carolina Cobetto, Appellant,

vs.

Frank Cobetto, Appellee,

Appeal from the Circuit Court of Montgomery County
SHURTLEFF, J.

Appellant filed her bill in the Circuit Court of Montgomery County for separate maintenance, custody of minor child, and adjustment of property rights. Appellee is charged with extreme and repeated cruelty and the excessive use of intoxicating liquor. The defendant answered said bill, making a general denial of all material allegations and claiming that all the property, whether in his name or hers, was his property, purchased by him or purchased by her with funds belonging to him. The cause was tried before the court and on June 15, 1929, a decree was entered which finds that the parties were married as alleged and that they lived together until about the 1st of January, 1923, since which time, on account of the ill treatment and cruelty committed by appellee on appellant, she, without her fault, has lived separate and apart from him; that the three children have lived with appellant since the time of the separation and that she is a fit and proper person to have the care, custody and control of the minor child, Mike Cobetto; that the appellant and appellee were engaged in the general merchandise business, which business was conducted by them for the benefit of each, and that the property accumulated and owned by them at the time of the separation was the result of their joint efforts; confirms title to the store building in appellant as well as the goods and merchandise in that part of

the store building occupied by her, and confirms in him stock in the State Bank of Taylor Springs and the stock of goods and merchandise in that part of the building occupied by him. The court, in adjusting the property rights, charges to appellant certain property and fixes a valuation upon the same as follows:

| | |
|-------------------------------------------------------------------|------------|
| Business building and confectionery
stock | \$2,000.00 |
| 5 U. S. Treasury Certificates | 4,000.00 |
| Savings Account First National Bank
of Hillsboro | 2,257.50 |
| Making a total valuation of prop-
erty charged to her of | \$8,257.50 |

The court charges to appellee as follows:

| | |
|----------------------------------------------------|----------|
| Dwelling house | 425.00 |
| Stock of goods, merchandise and
accounts | 5,500.00 |
| 5 shares of stock in Taylor Springs
Bank | 500.00 |

A total of \$6,425.00

The decree also orders appellant to surrender to appellee the Musatti note in the sum of \$600 and the Tagliole note in the sum of \$1,150 in order to equalize the amount of property received by each; decrees the \$5,000 in United States Treasury Saving Certificates and the savings account in the Taylor Springs Bank to be the property of both in equal proportions; orders the appellee to pay to appellant the sum of ten dollars per month from July 1, 1929, for the support of the minor child, Mike Cobetto.

It is the contention of appellant that all of the property mentioned in the decree, except the dwelling house, the stock of goods in that part of the store building occupied by appellee, and one-half of the savings account in the State Bank of Taylor Springs was the property of appellant and should have been decreed to her, and that the court erred in dividing the property as it did. Complainant, appellant, has brought the record to this court, by appeal, for review and cross errors are assigned by appellee.

It is contended by appellee that the proofs fail to show a partnership, or that any of said property was owned in common, or that appellant had any interest in said property and that the decree was contrary to the law and the proofs.

We have read the entire record and the proofs, and they tend to show the following state of facts: The appellant, Carolina Cobetto, and the appellee, Frank Cobetto, her husband, are natives of and were married in Italy in 1900. He came to this country first and she came in 1905. At that time appellee was living in Troy, Illinois, where he was joined by appellant. He worked in the coal mine for a while and afterwards ran a saloon. They kept boarders and lived in Troy until the year 1911, when they moved to Taylor Springs, Illinois. At the time appellant came to this country neither of them had any money, but by the time they moved to Taylor Springs she had fifteen hundred dollars which she had saved from keeping boarders, and he had four hundred fifty dollars which he had realized from the sale of his saloon. In 1912 appellant and appellee commenced to operate a grocery business in Taylor Springs in which she invested eight hundred dollars in the original stock and he invested two hundred dollars. The first two years little money was made, but after that time and up until about the first of January, 1923, when appellant and appellee separated and ceased living together the business prospered and they had accumulated considerable property, estimated by appellee to be worth forty thousand dollars. Most of the work in conducting the business was done by appellant and appellee, she having general charge of the store while he took orders and delivered merchandise. The store was operated in his name and all the business done in connection therewith was also in his name. Both parties bought and sold merchandise, made deposits and wrote checks on the bank account. Appellant and appellee had an agreement

soon after the business was started that each was to share equally in the proceeds. When money had accumulated in excess of what was necessary to operate the business it was equally divided between them, each taking his part. The store building in which the store was conducted downstairs and over which the family lived was purchased in 1918 for the sum of four thousand dollars, title of which was placed in appellant. Appellant on March 10, 1920, rented and from that time on was in the possession of a safety box in the Hillsboro National Bank in which she kept her money and other property.

From October 9, 1911, to December 3, 1917, a checking account was maintained in the State Bank of Taylor Springs in the name of Frank Cobetto, which was closed about the latter date and by agreement an account was opened in his name in the Hillsboro National Bank, which was maintained until the time of the separation.

Three children were born to appellant and appellee, namely: Tony Cobetto, who was twenty-one years of age April 13, 1927; Anna Cobetto, who was eighteen years of age April 3, 1927, and Mike Cobetto, who was nine years of age on December 22, 1928.

Some time before the separation appellee commenced to mistreat appellant and many times was guilty of personal violence towards her on many occasions hit, struck and otherwise ill-treated her. Appellee maintains that at the time of the separation they had forty thousand dollars worth of property, but that amount was considerable in excess of the amount shown on the trial as being in the possession of or owned by either or both of the parties at the time of the separation. It is disclosed by the evidence that the following property was in existence at the time of the separation:

One promissory note, dated November 1, 1920, for \$600, payable to appellee and signed by Stephen Mussatti;

One promissory note, dated October 10, 1921, for \$1,150, payable to appellee and signed by Suigi Taghiole.

Ten United States Treasury Certificates in the denomination of \$1,000 each, which cost when purchased \$8,000, half of which certificates were in the name of appellant and half in the name of appellee.

A savings account in the First National Bank of Hillsboro for \$2,257.57 in the name of appellant.

There was also a savings account in the State Bank of Taylor Springs for \$1,000 plus interest accumulations, in the name of appellee, one-half of which was claimed by appellant.

There was a small confectionery stock in one side of the store building valued at about \$150, where appellant has conducted a confectionery store since the separation.

In the main store building there was a stock of merchandise the value of which was estimated by the witnesses at from six to twelve thousand dollars, and after the separation appellee continued to conduct a store and dispose of the stock of goods until shortly before the time of the trial.

There was also a small dwelling house of the value of \$425 in the name of appellee and he had in his possession a sum of money shown to have been eight thousand dollars but claimed by him to have been only one thousand dollars.

Five shares of the capital stock of the State Bank of Taylor Springs of a par value of five hundred dollars, in the name of appellee.

The store building above referred to, which had been deeded and given to appellant long before the separation.

All of the above property, except the stock of goods in the store building, the stock in the State Bank of Taylor Springs, one-half of the savings account in the State Bank of Taylor Springs, and the money in the possession of appellee at the time of the separation, was claimed and shown to have been the property of appellant, and was property purchased and money had and loaned from funds which she had accumulated and saved entirely from her part of the business.

The above notes, treasury savings certificates, pass books and other certificates of title have been in the possession of appellant from the time of the separation until the time of the trial.

After appellant and appellee had separated and ceased living together, they, together with their children, continued to occupy the second story as a residence, he using one part and she and the children another portion of said upstairs. He continued to occupy and conduct his store in the portion of the first floor of the building, and she continued to occupy and conduct a confectionery in another part.

From the time of the separation until the time of the trial appellant paid all the taxes, insurance and expenses on said building as well as all repairs made on the same, and appellee paid nothing in rent. During said time appellant had the entire care, custody and control of their three children, paid all expenses of the same, he not contributing anything toward either her support and maintenance or that of their children. The record discloses that both appellant and appellee were hard workers; that she has taken proper care of the children, and the court permitted appellee to prove his good reputation in the community for sobriety.

Five of the United States Treasury Certificates in the name of appellant were disposed of by her in 1927, from which money she paid off a note in the sum of \$4,200 which represented money she had borrowed at various times and used in the support and maintenance of herself and the children.

These are substantially the facts as found by the chancellor who heard and saw the witnesses, and from the proofs that were uncontradicted.

It is contended by appellee that appellant and appellee are living in the same building, under the same roof, and that under the authority of *Smith v. Smith*, 156 Ill. App. 176, there is no proofs that the parties are living separate and apart from each other. What was said in *Smith v. Smith*, *supra*, was stated to be applicable to the particular facts and all of the facts in that case. In the case at bar appellee's answer admits that appellant and appellee are living separate and apart from each other and entirely eliminates the necessity of proof upon that question.

Appellee further contends that the court erred in finding that there was a partnership between appellant and appellee in the operation of the merchandise business between 1912 and 1923, upon the proofs submitted. The proof is conflicting but the proofs did show, on the part of appellant, that they had an agreement to divide the proceeds of the business and that such actual division of the proceeds and profits was made between them, and appellant was corroborated in her proofs. Appellee denied the agreement. The chancellor heard and saw all of the witnesses and this court arrives at the same conclusion from reading the proofs. Appellant claims to have put the larger sum of money into the business at its commencement, but neither party is corroborated in this respect. It was not necessary that there be an express agreement as to the partnership. *Heyman v. Heyman*, 210 Ill. 535. In this case it is held:

"There is testimony in the record, which justified the court in finding that the husband and wife were equally interested in the property. It was accumulated by the joint exertions of the husband and wife. It is true that there is no evidence of an express agreement of partnership between appellant and appellee,

but a partnership may exist under a verbal agreement, and without written articles of agreement. The existence of a partnership may also be implied from circumstances. (**Kelleher v. Tisdale**, 23 Ill. 354; **Bopp v. Fox**, 63 id. 540; **Lintner v. Millikin**, 47 id. 178; **Haug v. Haug**, 193 id. 645.) In the case at bar, the proof shows that the business was carried on for the benefit of both appellant and appellee as the heads of the family. Appellee and her husband both took responsible parts in the management of the business. She looked after the store as well as he, spending a good part of the day there. She made loans, and built up the business by her labor."

As to the right of these parties to enter into a partnership agreement, it was held in **Heyman v. Heyman**, *supra*, page 530:

"In the first place, it is contended by the appellant, that a partnership cannot exist between husband and wife. Such seems to be the general rule in other jurisdictions than Illinois. It is said by Bates in his work on the Law of Partnership, (vol. 1, sec. 139, that the preponderance of authority, even under the broadest statutes, is in favor of the position that a married woman has not capacity to contract a partnership with her husband. Such, however, cannot be the law in Illinois. Section 6 of chapter 68 of the Revised Statutes of Illinois., being the act to revise the law in relation to husband and wife, provides as follows: 'Contracts may be made and liabilities incurred by a wife, and the same enforced against her, to the same extent and in the same manner as if she were unmarried; but, except with the consent of her husband, she may not enter into or carry on any partnership business, unless her husband has abandoned or deserted her, or is idiotic or insane, or is confined in the penitentiary.' (2 Star & Curt. Ann. Stat.—2d ed. —p. 2122). It has been held by this court that, under the existing law in this State, married women are placed on the same footing as

femes sole in respect to all property rights, including the means to acquire, protect and dispose of the same; and that all restrictions upon the power of husband and wife to contract with each other, except so far as they are expressly retained, are removed. It thus appears that husband and wife may contract with each other without restriction, except that the wife may not enter into or carry on any partnership business 'except with the consent of her husband.' The plain inference is, that she may carry on a partnership business if she has the consent of her husband, and, as she may make contracts with him, there is no reason why she may not make a partnership contract with him, or a contract for a partnership business with him, where she obtains his consent thereto. The very fact, that a partnership is formed between husband and wife, pre-supposes that it is done with his consent."

None of appellee's assignments of error can be sustained.

It is contended by appellant that the court erred in charging to appellant the value of the store building as property received by her from said business. The evidence shows that this building was bought in 1918, three years before the separation and title taken in the name of appellant. It is immaterial, so far as this property is concerned, whether a partnership existed or not, or whose money paid for it. Under the law, the presumption is that when the title was placed in appellant by her husband it was a gift to her. "Where a husband purchases real estate and the title to the property or an interest therein is taken in the name of the wife, there is a presumption that the husband intended a gift to the wife." (*Crysler v. Cryslor*, 330 Ill. 74; *Partridge v. Berliner, et al.* 325 Ill. 253.)

The title to this property does not need to stand upon presumption, as appellee testified: "I gave her the building and

nothing else." In *Crysler v. Crysler*, *supra*, the court held: "Where the husband purchases real estate and the title to the property or an interest therein is taken in the name of the wife there is a presumption that the husband intended a gift to the wife; but this presumption may be rebutted. (*Partridge v. Berliner*, 325 Ill. 253.) The court should have found that the store building was the sole and separate property of appellant and that appellee had no interest therein.

Appellant further assigns as error that the court failed to charge appellee the separate maintenance and support for appellant and their three children from the first day of January, 1923, the time of separation, to the date of the decree, and the court's failure to give appellant credit for money expended in such support and maintenance. The decree finds that appellant was living separate and apart from appellee without her fault; that she was a fit and proper person to have the care, custody and control of the minor child, Mike Cobetto, gives her such control, and provides that appellee shall pay ten dollars per month for the support of said minor, commencing the first day of July, 1929, but makes no provision whatever for any separate maintenance for appellant herself, charges nothing to appellee and gives appellant no credit for money she had expended in providing and caring for herself and children from the time of the separation down to the hearing. The evidence in this case discloses without any dispute that appellant had the care, custody and control of the children, Tony Cobetto, Anna Cobetto and Mike Cobetto, from the time of the separation until the time they became of age, and as to the latter child until the time of the hearing. The record also discloses, without any contradiction, that appellee did not contribute anything during that period to the support of either appellant or the children, but that the entire burden was borne by her. The record also discloses that none of the

children contributed any substantial amount toward their own support. The oldest boy, Tony Cobetto, was of age on April 13, 1927, and the daughter, Anna Cobetto, was eighteen years of age on April 3, 1927. In other words, it was four and one-half years from the time of the separation of these parties until these two children became of age. Mike Cobetto was substantially nine and one-half years of age at the time of the hearing. It appears that the length of time which appellant supported and cared for these three children would correspond to a period of more than fifteen years for one child. The record is not complete as to the amount of money which appellant spent in providing for herself and the children since the time of the separation, although it does show without contradiction that five thousand dollars of Government Treasury Savings Certificates were cashed by her in 1927 and that she used forty-two hundred dollars of this money in paying a note which represented money she had borrowed at various times for the purpose of providing and caring for herself and children. The court charges the value, at the time of the separation, of the United States Treasury Certificates in the sum of four thousand dollars, thus cashed by appellant, without giving her any credit for the forty-two hundred dollars which she spent in caring for the family. The statute which provides for separate maintenance suits makes it the duty of the court, where married women live separate and apart from their husbands, without their fault, to require of the husband reasonable support and maintenance while they "have so lived separate and apart."

In *McGee et al v. McGee et al*, 91 Ill. 554, the court held: "It does not militate against this view of the law that the widow may have sufficient means, derived from her separate estate, with which to support her minor children. She is not bound, in the first instance, to apply her separate estate to the support of her husband's children. The law has cast that obligation primarily upon

the husband's estate. The policy of the law is, to provide a home for the family, that they may be kept together, and the mother is not obligated by her antenuptial agreement to abandon her children, but may share with them the homestead which their father in his lifetime had provided, so long as the youngest child is under twenty-one years of age. As in **Phelps v. Phelps**, 72, Ill. 545, the antenuptial contract may debar the widow of dower in her husband's lands, but it does not prevent her from sharing in the provisions the law has made for the benefit of the family. It is a matter of public concern, and the beneficent provisions of the statute for the protection of the family can not be abrogated by mere private contract between parties not alone within its provisions." And in **Goelitz Co. v. Industrial Board**, 278 Ill. 169, the court held: "The duty to support his wife is imposed by law on the husband. This duty does not depend on the inadequacy of the wife's means but on the marriage relation." In **Decker v. Decker**, 279 Ill. 308, the court further held: "If the wife's income be insufficient to maintain her and carry on the litigation, the husband's income should be required to contribute to her income as alimony and to bear the expense of the suit. If the income of the wife be sufficient to suitably support her there will ordinarily exist no reason for making an allowance for that purpose. The amount allowed a wife for separate maintenance or alimony varies from a sum sufficient to meet the actual wants and necessities of the wife, to a third and even a half of the income of the husband. Where they both have an income the method of computation of a proper allowance for her support and maintenance is to add the wife's annual income to her husband's, consider what, under all the circumstances, should be allowed her out of the aggregate, then from the sum so determined deduct her separate income, and the remainder will be her proper annual allowance." (**Harding v. Harding**, 144 Ill. 588.)

Under all of the circumstances, in consideration of the record, it was error to charge the Government Savings Certificates in any amount to appellant. It is further shown by the testimony that at the time of the separation, in addition to the other property growing out of said business, appellee had a considerable sum of money. Appellee testifies that the sum of one thousand dollars was in his pocketbook. The preponderance of the testimony shows that the sum was much larger. It certainly was error not to have charged this sum of one thousand dollars to appellee in the settlement.

It is further assigned as error that the court below did not charge appellee for the use and occupation of the store building occupied by him from the time of the separation to the time of the hearing. As already shown, the store building was the property of the appellant and was a gift to her from appellee when the parties separated their business relations as well as marital relations ceased to exist, but appellee continued to occupy and conduct his store in said building without the payment of rent of any kind. The record does not disclose what would be a reasonable rental for the premises. The bill alleges that the reasonable value of the premises from the date of separation to the filing of the bill was the sum of two thousand dollars, and this allegation is not denied in appellee's answer. However, we are of the opinion that there should be a further accounting as to this matter of rent to be paid by appellee to appellant from the date of separation down to the final disposition of this cause, or until appellee has or shall have ceased to occupy said premises, which amount of rent in its entirety should be paid by appellee to appellant. Upon a remandment of this cause the Circuit Court of Montgomery County will proceed with such accounting.

The decree of the court below made no provision for the separate maintenance of appellant in moneys for her support and

did not state an account in that regard. However, there is no assignment of error covering this claim and any decree entered in that respect is subject to modification upon a change in conditions, and the decree for support money for the minor, Mike Cobetto, is in the same situation. As to all other provisions of the Circuit Court of Montgomery County, not mentioned in this opinion, the same are affirmed.

The decree of the Circuit Court of Montgomery County as to the items and matters set out in this opinion, is, therefore, reversed and the cause remanded to that court for further proceedings not inconsistent with the matters set out in this opinion.

Reversed and remanded with directions.

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Opinion filed Feb 3-1930
Release denied April 4-1930
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General No. 8368

Agenda No. 26

OCTOBER TERM, 1929

256 I.A. 615¹

FRANK GRIESSER, Appellee,

vs.

REISCH BREWING COMPANY, a Corporation,

Appellant

Appeal from the Circuit Court, Sangamon County
SHURTLEFF, J.

Appellee brought his action in the Circuit Court of Sangamon County on a plea of trespass on the case on promises, for unpaid wages in the amount of \$1475.55 upon the following account:

Wages and salary for 12 months

1922 \$600.00

Wages and salary for 12 months

1923 \$600.00

Wages and salary for 10 months

1924 \$500.00

Total wages and salary due \$1700.00

and appellee gave appellant credit for:

Amount overpaid in 1926 \$150.00

Amount overpaid in 1928 74.45

Total credits \$ 224.45

leaving a balance due of \$1475.55
of which account there was an affidavit of claim.

Appellant filed pleas of the general issue, of the Statute of Limitations, of accord and settlement and full payment. There were replications by appellee, a trial by jury and a verdict and judgment in the sum of one thousand dollars in favor of appellee. Appellant has brought the record to this court, by appeal, for review.

There are no errors assigned as to rulings upon the admission or rejection of evidence, or the giving or refusal of

instructions. At the close of plaintiff's case and again at the close of all the evidence appellant moved the court to instruct the jury to find a verdict for appellant, which the court refused to do, and it is assigned as error. Appellant insists that the verdict should have been for the full amount of the claim or nothing.

Appellee's proofs showed that he had worked for appellant from 1912 down to the year, 1928, except that he was in Peoria the larger part of one year in the years 1924 and 1925. Appellee testified that appellant made "near beer" for a period after prohibition and at about the beginning of 1922 appellant ceased making "near beer"; that the business became less active and not so profitable, yet it needed some one to look after the property and care for the machinery and that appellant requested appellee to continue his work at his former salary, but to leave a portion of his salary in appellant's hands. Appellant agreed to pay all of his salary later, renewed these promises later and paid a portion of the back salary as set out in the account. Appellee, after crediting the exact amounts paid him in 1926, 1927 and 1928, testifies that appellant is indebted to him in the sum of \$1458.89. There was very much conflict in the proof and the claims of each party were denied by the other. Appellant's witnesses testified that appellee was indebted to appellant. Appellant's witnesses testified that appellee had been fully paid for all work done prior to 1925. Appellant contended and now contends that appellee failed to prove his claim that a portion of his wages had been withheld upon a promise to pay such wages later. There was, however, considerable testimony before the jury supporting appellee's claim and the statements of appellant's employees were corroborative.

There is no dispute between the parties but that appellee

worked for appellant during 1922, 1923 and 1924, as claimed. Appellee testified that he was to receive the sum of \$175 per month, of which only the sum of \$125 per month was paid, while appellant offered testimony tending to show that appellee's salary during that period was only \$125 per month, which had been paid in full. Notwithstanding appellant admitted appellee's employment during the years 1922, 1923 and 1924 and claimed the salary was at the rate of \$125 per month, all of which had been paid, appellant offered proofs tending to show that "portions of the time appellee was not at the plant; that he only came there to get his pay check," and that, as one witness testified, "I only saw him there two or three times per week." There was sufficient testimony in the record to support the verdict. It is the rule in an action *ex contractu* that a compromise verdict will stand if substantial justice has been done and the verdict is consistent with the evidence or defense. (*Kerman v. Advance Terra Cotta Co.* 211 Ill. App. 316.)

The weight of the conflicting evidence was a question for the jury, and it was the province of the jury to determine the preponderance and the credibility of the evidence. (*Foster v. Swanson*, 189 Ill. App. 344; *Gerlock v. Conroy*, 197 Ill. App. 398; *Green v. Ryon*, 242 Ill. App. 466; and *Deming v. Prudential Ins. Co.*, 190 Ill. App. 604)

In actions for breach of contract where the jury found such a contract but awarded a much less sum, if the evidence is conflicting it will be upheld by the court. A defeated party can not complain that a verdict was for a less amount than the evidence of the successful party warranted. (*Central Trust Co., v. Kuglin*, 194 Ill. App. 294; *German v. Advance Terra Cotta Co.*, *supra*, *Janssen v. Janssen*, Gen. No. 7671, Third District Ill. App. Court.)

The Janssen case was a suit upon three notes for four thousand dollars, and the verdict was for \$2,425. It was contended by appellant that the verdict was wrong because the verdict should have been larger and for the full amount or nothing. Justice Niehaus, in the opinion of the court, held: "It is sufficient to point out in reference to this contention that appellant was not harmed by this error, and therefore is not in position to raise any objection thereto."

For the reasons stated, the judgment of the Circuit Court of Sangamon County is affirmed.

Affirmed.

Cost

Filed Feb 3 - 1930

*minutes in
brief of appellant*

H

11a

256 I.A. C15²

General No. 8357

Agenda No. 18

OCTOBER TERM, 1929

A. F. Huber, For the Use of, W. F. Crumbaugh
Trading as the PEOPLES OIL CO., Etc., Appellants,

vs.

A. J. Walters, W. H. Wrigley and H. W. Wrigley,
partners, doing business under the firm name and
style of H. W. Wrigley & Co., and Farmers
State Bank of Downs, Appellees.

Appeal from the County Court of McLean County.

PER CURIAM:

This is a garnishment suit, originally brought by
A. F. Huber for the use of W. F. Crumbaugh, trad-
ing as the Peoples Oil Company, against A. J. Walters,
W. H. Wrigley and H. W. Wrigley, partners, doing
business under the firm name and style of W. H.
Wrigley & Co.

Interrogatories were filed, to which the gar-
nishees filed their answers, admitting an indebtedness
to the execution debtor, A. F. Huber, in the sum
of \$660.04, the proceeds of certain corn sold to gar-
nishees on March 2, 1926.

Before the case was reached for trial the Farm-
ers State Bank of Downs, Illinois, a corporation, an
adverse claimant, appeared and filed an interplea,
claiming the title to the funds in the hands of the
garnishees and was admitted as a party to the suit,
so far as respected its title to the funds in question.

The death of W. F. Crumbaugh, the beneficial
plaintiff, being suggested of record, Lottie Crum-
baugh and Charles Eldoris Crumbaugh, executors,
were substituted as beneficial plaintiffs.

A jury being waived by the parties, the case was tried by the court solely upon the question of the title to the funds in the hands of the garnishees. There was no controversy about the facts. A. F. Huber, the execution debtor, was a tenant farmer who resided upon and tended some 241 acres of farming land, during the season of 1925, in Empire Township, McLean County, Illinois, which was owned by one Logan Fry. On June 1st of that year he executed a note in the sum of seventeen hundred dollars to the Farmers State Bank of Downs, Illinois, and secured the same by a chattel mortgage of that date, duly signed, acknowledged and recorded, purporting to convey to claimant the undivided one-half of 170 acres of growing corn located in the northeast one-half of section 1, township 22, range 4 east of the third principal meridian in McLean County, Illinois.

On March 5, 1926, W. F. Crumbaugh, trading as the Peoples Oil Company, obtained a judgment in the County Court of McLean County, Illinois, against A. F. Huber for the sum of \$293.93 damages and five dollars costs. An execution was issued on such judgment and was returned by the sheriff on March 8, 1926, "No property found in my county," whereupon an affidavit in garnishment was filed, a writ issued and served upon the garnishees. The plaintiffs introduced the record of the judgment, the issue of the execution and its return by the officer, together with the letters testamentary, and rested. The claimant (designated defendant) offered its note for \$1,700, dated June 1, 1925, and signed by A. F. Huber, and offered the chattel mortgage executed by A. F. Huber on June 1, 1925, duly acknowledged and recorded. The mortgage was objected to on the ground that the description of the mortgaged property was insufficient to locate the property mortgaged and because there was no proof that the funds in the hands of the garnishees had nothing to do with the property alleged to be contained or described in the exhibit. But the

court overruled the objection, to which ruling the plaintiffs excepted.

The only witness offered by the claimant, Farmers State Bank of Downs, was J. R. Carlisle, a stockholder of said bank. The competency of this witness was challenged by an objection, but the objection was overruled and exception was preserved. It appeared from the testimony of this witness that A. F. Huber owed the Farmers State Bank of Downs, before the note and mortgage mentioned were executed, between thirty-five and thirty-eight hundred dollars; that the bank took one note of seventeen hundred dollars from A. F. Huber and his father-in-law as security, which was unpaid at the time of the trial; that the bank advanced him three hundred dollars to pay his corn huskers and took a mortgage on his corn. The witness states that he knew what corn the mortgage covered; that it was growing corn on the northeast half of section 1, township 22, range 4, east of the third principal meridian, which Mr. Huber was farming at that time but which was owned by Logan Fry; that it was hauled to Sabina and delivered to the Wrigley Grain Company some time in December; The witness was asked, "Did you ever talk to Mr. Huber about that corn?" to which an objection was interposed, overruled by the court and exception noted. In detailing the conversation the witness testified that Huber wanted to know about the price; said it was about as good as he could get, better sell and reduce his loan and apply the money on his note; that A. F. Huber never applied any of the crop or turned over any money to the bank. On cross-examination this witness stated that he knew A. F. Huber had all the 170 acres of corn planted on June 1, 1925, and it was good, but did not know that Mr. Huber had corn on any other tract of land that year; that the bank never foreclosed the mortgage or took possession.

of the property; that it was turned over without that.

The plaintiffs on rebuttal proved that on October 5, 1925, the Farmers State Bank of Downs, by a letter written to witness W. A. Webb, authorized witness to advance fifty dollars to A. F. Huber, the mortgagor, on one hundred bushels of his corn, and that it would release that amount on Huber's mortgage; that witness advanced the fifty dollars to Huber and that later on Huber hauled four or five loads of corn to witness and witness was about to deduct the fifty dollars which he had advanced to him when Huber objected to it and Huber called the Farmers State Bank of Downs over the telephone and the bank authorized the witness to pay the money to Huber; that the amount paid to Huber was one hundred thirty to forty dollars. It was further shown by witness Claude Dawson that the mortgagee permitted large sums to be paid out of the proceeds of the corn, alleged to be mortgaged, to Huber's other creditors and permitted Huber to retain 498 bushels of the corn for feed. All of these payments and the value of the corn retained for feed aggregate the sum of \$1,401.57. It was further shown by witness William D. Fricke that in 1925 the mortgagor had twenty-six or twenty-seven acres of land in the southwest half of section 1, not covered by the mortgage, in corn, which yielded seventy-five to eighty bushels per acre.

There was no proof that the mortgagor ever delivered the alleged mortgaged property to the mortgagee or to the Wrigley Grain Company for the mortgagee and no attempt was made by claimant to show that the corn sold to the garnishees by A. F. Huber on March 2, 1926, was corn that was raised on the premises described in their chattel mortgage, and there is no evidence in the record identifying the corn sold to the garnishees as the corn of which the claimant was the owner. A. F. Huber sold 2,279 bushels of corn on December 21, 1925, and on March 2, 1926, he sold to garnishees 3,742 bushels. The moneys now

in the hands of the garnishees are the proceeds of the sale of March 2, 1926. The court found the issues for the defendants W. H. Wrigley & Company and entered judgment on its findings and dismissed the writ of garnishment at plaintiffs' costs, to which the plaintiffs excepted. Appellants have appealed.

Appellees have presented no brief or argument in this court and, therefore, under the rules of this court the judgment of the lower court is subject to reversal and remand. In addition we have examined the record and abstract presented and find various errors necessitating the reversal of the judgment. Appellants were suing in a representative capacity as the executors of a deceased person, and the testimony of the witness Carlyle, a stockholder in claimant's bank, was therefore, under the statute, incompetent. In addition, much of his testimony was hearsay, giving statements of the debtor, A. F. Huber, which was admitted over the objections of appellants. The description of the corn in the chattel mortgage held by the claimant bank was indefinite and uncertain, describing it as, "The undivided one-half of one hundred and seventy acres of growing corn located in the northeast one-half of section one, township twenty-two, range four east," etc. This description is of very doubtful validity. In addition, the judgment debtor raised another field of corn, yielding about eighteen hundred bushels, in the southwest portion of said section. It was shown that Huber hauled corn to the elevator of appellees and sold it, and that claimant bank knew nothing of such sales until about a year thereafter. Of the corn sold to appellees by Huber, upon which there remains a balance due of \$660.04, there is nothing to show whether it was raised in the southeast or southwest part of said section one, and it follows that in so far as the lien of appellant's is concerned, it is superior to the chattel mortgage lien of

claimant bank. It follows that the judgment of the County Court of McLean County should be reversed and the Judgment is reversed and the cause remanded to the County Court of McLean County, with directions to enter a judgment in favor of the appellant for use, etc., for the amount of their claim against appellees.

abst

Filed Feb 3 - 1930

12a

256 I.A. 615³

General No. 8369

Agenda No. 27

OCTOBER TERM, A. D. 1929

Travelers Insurance Company, Appellee,

vs.

George F. Reisch, Carl M. Reisch and Harry T. Morgan, doing business under the firm name of Reisch, Morgan and Reisch, Appellants

Appeal from the Circuit Court, Sangamon County

PER CURIAM:

Appellee brought suit in this cause to recover premiums for insurance in the amount of \$1873.54, collected by appellants for appellee and retained by appellants. Appellants interposed a defense of set-off. Appellants were employed at the time in question in this case as agents for the production of insurance business. The cause was tried before the Circuit Court of Sangamon County, without a jury.

Upon the trial appellants admitted the collection and retention of the premiums as charged in the declaration but contended that they were entitled to two items of set off against appellee's claim amounting to \$522.35 and \$1346.87, respectively.

The first item of set-off was based upon a charge made against appellants for what is called "earned premiums." Appellee contended that according to the rules of the company if a policy was issued and delivered to appellants and was held by them for more than sixty days but subsequently cancelled, a premium could be charged against the account of appellants. The premium charged was in proportion to the length of time over sixty days which the policy was held by appellants. This sixty-day period was called a placing period.

The list of policies and premiums under the head of "Earned Premiums" showed all such policies had been held by appellants for more than the sixty-day period. The evidence showed that these policies were not taken by the policy holders and were later returned to the appellee and cancelled.

Appellants contended that the earned premium was wrongfully charged against them. Their evidence upon the trial was concerning almost entirely this phase of the case. The testimony showed that one of the methods used by appellants in soliciting business was to secure information about a prospect and from that fill out an application. This application was then sent to the Peoria office of appellee, where a policy was written and sent to appellants. Appellants then called on the prospect with the policy already prepared and endeavored to prevail upon him to accept the insurance. If the prospect accepted the policy it was delivered to him at once and a premium charged against him on the books of appellants. If the prospect refused to accept it, it was returned to the Peoria office with an explanation for its return and was there cancelled.

Two of appellants' solicitors, LeStrange and Head and Harry Morgan, one of the appellants, testified that in various conversations with certain of the managers and special agents of appellee they were told to follow this method of securing business, and that, if they were unable to place the policies, they could return the policies not accepted by the prospects and receive a refund of the premium advanced by them. There was further evidence that in seven instances appellants had been allowed refunds when the policies were retained by them over the sixty-day plying period. The trial court found for appellants on this question and allowed the set-off of \$522.35.

The second item of set-off, called "Uncollected Travelers Accounts" claimed by appellants, was composed of a list of

policies and premiums which they claimed had not been fully paid to appellants by the policy holders. Appellants contend that these policies were issued under the same circumstances as were the policies listed under the heading of "Earned Premiums." The evidence disclosed that all of the policies so listed had been delivered to the policy holders and were accepted by them. These policies were never returned to appellee for cancellation. Appellants had entered the amount of each premium due from each policy holder upon their books and were collecting these accounts. This claim was not for the full amount of the premiums advanced but was for the balance due from the policy holders after deducting the amounts each had paid. On some of these accounts collections were made by appellants after this suit was started and the list had to be amended upon the trial to show these payments.

All of these policies were in force for a full year after they were issued. A number were continued in force by the policy holders for several years and some of them were still kept in force by the holders at the time of the trial. Upon some of these policies appellee had paid claims.

Morgan testified that he had conversations with representatives of appellee in which he told them that these accounts had not been collected and was told that if he sent in the money and failed to collect from the policy holders the premiums would be refunded to appellants. He said appellants' bookkeeper, McReynolds, was present at these conversations. McReynolds testified on behalf of appellants but gave no testimony of any such conversations. Head and LeStrange testified that the conversation was that if the policies were not placed with the prospective policy holders and were returned to appellee for cancellation, the premiums would be refunded. Certain of the representatives of

appellee named by Morgan as having made the statement testified on the trial and denied making any such statement. The contracts which were in force at this time between appellee and all the persons named by Morgan were introduced in evidence and disclosed express provisions therein to the effect that the agent had no power to make any such agreements. Morgan said he had no personal knowledge of the items listed under the heading "Uncollected Traveler's Accounts" as those things were beyond his department. He also said in reference to this item of set-off, "I do not know as to the accuracy of the set-off here." McReynolds also said he knew nothing about the facts relating to this item as he just kept the books for appellants. All of the instances given by appellants when refunds were allowed them by appellee, relate to refunds allowed after the prospects had refused to accept the policies and after their return and cancellation, and no instance was given in which the return and cancellation did not appear.

The trial court found against appellants on the second ground of set-off and entered judgment against appellants for the sum of \$1351.19, from which judgment this appeal is taken. Appellants did not request any findings of fact or holdings of propositions of law at the conclusion of the trial and the court found generally for appellee.

Appellants complain that they were foreclosed from showing a course of dealing between themselves and appellee which would have entitled them to commissions upon other business written for appellee by other agents in the City of Springfield. There was no offer by appellants of any evidence tending to support this contention upon the trial. Appellants' counsel asked his witnesses certain questions to which objections were sustained but did not follow this up by making any offer of proof. The action of the court in sustaining an objection to a question cannot be reviewed on appeal in the absence of an offer of proof. (*Ittner Brick Co v. Ashby*, 198 Ill. 565; *Scofield v. Wabash Ry. Co.*, 214 Ill. App. 353; *Geringer v. Novak*, 117 Ill. App. 160; *Owens*

v. Gurney, 241 Ill. App. 477.) It was contended by appellants that the terms of the contract were ambiguous and that appellants were precluded from showing the course of dealing between the parties in order to shed light upon the construction of the contract given to it by the parties to this suit. It should be sufficient answer to this contention to point out that appellants, neither in their abstract nor briefs, have seen fit to present to this court the terms of the contract entered into between appellants and appellee, or to enlighten the court as to its ambiguous terms. We have examined the record and the contract and are satisfied that its terms are in no manner ambiguous, and under such circumstances evidence of a practical construction of a contract by the parties is not admissible. (**Sholl Bros. v. P. & P. U. Ry. Co.**, 276 Ill. 267; **Finch v. Theiss**, 267 id. 65; **The Joliet Bottling Co. v. The Brewing Co.**, 254 id. 215.)

Finding no errors in the record that will warrant a reversal of this judgment, the finding and judgment of the Circuit Court of Sangamon County is affirmed.

Affirmed,



Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

TERM NO. 3.

AG. NO. 13.

256 I.A. 615⁴

PEOPLE OF THE
STATE OF ILLINOIS,
Defendant in Error,
· V.

ERROR TO
FAYETTE CIRCUIT
COURT.

WILLIAM GERMAN,
Plaintiff in Error.

Barry, P. J. - Plaintiff in error was convicted on charges of possessing and manufacturing intoxicating liquor. Prior to the day of trial he moved the court to quash the search warrant and to suppress the evidence procured thereunder. The motion was denied and he now insists that such ruling constitutes reversible error. The question has not been properly preserved. The abstract does not show that he excepted to the ruling of the court, and the alleged error in that regard is not referred to in the motion for a new trial.

The contention is that the premises to be searched were not properly described in the complaint or in the search warrant. The description is as follows:- "House and out-buildings being the first premises or residence north of the National road and east of the road running north at the school house commonly called the Bluff City School in Vandalia township, the said premises being occupied by William German as a residence, in the county and state aforesaid." It is argued that the first

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STATE OF ILLINOIS
COUNTY OF COOK
COURT OF COMMON PLEAS

1915

COMMONS, N. E. 1915

TERM NO. 3.

PEOPLE OF THE
STATE OF ILLINOIS,
Defendant in Error,
V.
WILLIAM GERMAN,
Plaintiff in Error.

WILLIAM GERMAN,
Plaintiff in Error,
V.
PEOPLE OF THE
STATE OF ILLINOIS,
Defendant in Error.

WILLIAM GERMAN, Plaintiff in Error, vs. PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error. This is an appeal from the judgment of the Circuit Court of Cook County, Illinois, in the above entitled cause. The record shows that on the day of trial he moved the court to quash the indictment and to suppress the evidence procured therefrom. The court refused to do so and he now insists that such ruling constitutes reversible error. The question has not been properly presented. The abstract does not show that he excepted to the ruling of the court, and the alleged error in that regard is not reflected in the motion for a new trial.

The contention is that the premises to be searched were not properly described in the complaint on the search warrant. The description is as follows: "House and outbuildings being the first premises on the second north of the National road and east of the first running water at the school house corner called the first 111th street in the city of Chicago." The said premises being owned by William German as a tenant in the county and state of Illinois. It is argued that the first

residence north of the National road and east of the road running north at the school house aforesaid, is the property of another person and not that of William German. The property of the other person is just north of the National road and is about three or four hundred feet east of the north and south road. The residence of plaintiff in error is six or seven hundred feet north of the National road and just east of the north and south road. The description in the complaint and in the search warrant expressly states that the premises referred to were occupied by plaintiff in error as a residence. That being true the sheriff would have no difficulty in finding the premises referred to.

A search warrant sufficiently described the place to be searched if it points out a definitely ascertainable place in terms of reasonable certainty so as to enable the officer with reasonable effort, to identify the place, and a technical description of the place is not required; *People v. Holton*, 326 Ill.481; *People v. Lavendowski*, 320 Ill. 223.

It is argued that there was no competent evidence that the liquor found in the search contained more than one-half of one percent of alcohol by volume. The officers testified, without objection, that they were familiar with the taste and smell of intoxicating liquor and that they tasted the liquor in question and that in their opinion it contained at least three or four percent of alcohol by volume. If plaintiff in error thought that the witnesses were not sufficiently qualified to express an opinion on the subject, he should have objected to their testimony. Not having done so he is in no position to complain. At least two witnesses testified that plaintiff in error told them that he and his wife had made the liquor.

It is argued that the court erred in refusing to give plaintiff in error's first refused instruction. In the state of the proof there is no reasonable doubt as to the defendant's guilt. The jury acting as reasonable men could not have reached any other conclusion. It is unnecessary to decide whether the instruction stated a correct rule of law. No reversible error having

residence north of the National road and east of the road running
north at the school house corner, is the property of another
person and not that of William German. The house of the other
person is just north of the National road and is about three or
four hundred feet east of the north and south road. The residence
of plaintiff in error is six or seven hundred feet north of the
National road and just east of the north and south road. The
description in the complaint and in the search warrant apparently
states that the premises referred to were occupied by plaintiff
in error as a residence. That being true the sheriff would
have no difficulty in finding the premises referred to.
A search warrant sufficiently described the place
to be searched if it points out a definitely ascertainable place
in terms of reasonable certainty so as to enable the officer with
reasonable effort, to identify the place, and a technical descrip-
tion of the place is not required; People v. Nolan, 280 Ill. 481;
People v. Jaworski, 280 Ill. 323.
It is argued that there was no search at all
that the liquor found in the search contained more than one-half
of one percent of alcohol by volume. The officers testified,
without objection, that they were familiar with the taste and
smell of intoxicating liquor and that they tasted and liquor in
question and that in their opinion it contained at least three
or four percent of alcohol by volume. If plaintiff in error
thought that the witnesses were not sufficiently qualified to
express an opinion on the subject, he should have objected to
their testimony. Not having done so he is in no position to
complain. At least two witnesses testified that plaintiff in
error told them that he and his wife had made the liquor.
It is argued that the court erred in refusing to
give plaintiff in error's first witness testimony. In the state-
ment of the proof there is no reasonable doubt as to the defendant's
guilt. The jury acting as reasonable men could not have reached
any other conclusion. It is unnecessary to decide whether the in-
struction stated a correct rule of law. The prevailing view being

been pointed out the judgment is affirmed.

AFFIRMED.

Not to be reported

been printed out the judgment is affirmed.

That to be separated



STATE OF ILLINOIS.
APPELLATE COURT.
FOURTH DISTRICT.

FILED

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RECEIVED
CLERK OF THE APPELLATE
COURT OF THE FOURTH DISTRICT

October Term, A. D. 1929.

14a

TERM NO. 18.

AG. NO. 22.

OLIVER MARTIN,
Appellee,

V.

ARMOUR & COMPANY,
Appellant.

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:
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:
:

APPEAL FROM

ST. CLAIR CIRCUIT

COURT.

256 I.A. 615⁵

Barry, P. J. - Appellee recovered a verdict and judgment for \$1500.00 for injuries sustained in an automobile collision on June 27, 1928. He was riding in a Buick car owned and driven by his son. They were going in a southerly direction on a cinder road south of Venice when the accident occurred. There is a street car track along and upon the east edge of the road and the road west of the west rail of the street car track is 18 or 20 feet wide. That portion of the highway east of the street car track is in no condition for vehicular traffic and is not traveled. The collision occurred in the early morning during the existence of a very dense fog. The lights on the Buick car were burning and appellee says the car was three or four feet from the west edge of the road just before the collision, but he could not say where it was at the time of the impact. He says nothing about the speed of the car or that of appellant's truck. In fact he says he did not see the truck until after the collision.

Appellee's son says the Buick was nine feet west of the west rail of the street car track and about three feet from

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Applicant.
R. G. & Co.,
V.
L. E. & Co.,
Applicant.

Q. Now, you say the truck was in the road and
the west wall of the street car track was about 10 feet
from the west edge of the road just before the collision.
A. Yes, that is correct. I saw it at the time of the collision.
Q. And he could not say where it was at the time of the collision.
A. Yes, that is correct. I saw it at the time of the collision.
Q. Now, you say the truck was in the road and
the west wall of the street car track was about 10 feet
from the west edge of the road just before the collision.
A. Yes, that is correct. I saw it at the time of the collision.

the west edge of the road when the collision occurred. On direct examination he says the collision knocked his car back three feet. On cross examination he says the truck must have been going pretty fast to knock his car six feet. He says he saw the truck about three seconds before the impact and it was then from six to ten feet ahead of his car. That his car was not on the street car track until after the collision. When asked how the truck got on the street car track he said it drove around to the right of his car after the collision.

The driver of appellant's truck says his lights were not burning and that the fog was ^S so dense lights would do no good; that he was driving north astride the west rail of the street car track and was in that position at the time of the impact; that he was driving six or eight miles an hour and saw the Buick coming toward him when fifteen or twenty feet away and that it was also astride the west rail of the street car track; that it was going about twenty miles per hour; that he applied his brakes as soon as he saw the Buick car and was practically stopped when the impact occurred. He says that after the collision he backed up to pull the machines apart; that when he drove away there was no room to pass on the east side of the Buick and he passed on the west side.

The witness Owen was driving a truck and was two hundred or three hundred feet back of appellant's truck when the collision occurred. He says he drove up to the scene of the accident and found the right wheels of appellant's truck and the left hind wheels of the Buick between ^{the} rails of the street car track. Another witness was driving a truck and at the time of the impact was about twenty feet behind appellant's truck. He says he stopped, left his truck and walked around appellant's truck and its right wheels and the left wheels of the Buick were between the rails of the street car track; that the machines were driven together and the driver of appellant's truck reversed and parted them.

It clearly appears from the testimony of the three truck drivers that immediately after the collision the Buick and

the west side of the road when the collision occurred. On direct examination he says the collision happened at a cross street. In cross examination he says the truck must have been going pretty fast to knock his car six feet. He says he saw the truck about three seconds before the impact and it was then from 20 to 25 feet ahead of his car. That his car was not on the street car track until after the collision. When asked how the truck got on the street car track he said it drove around to the right of his car after the collision.

The driver of appellant's truck says his lights were not burning and that the fog was so dense lights would do no good; that he was driving north outside the west rail of the street car track and was in that position at the time of the impact; that he was driving six or eight miles an hour and saw the Buick coming toward him from fifteen or twenty feet away and that it was also outside the west rail of the street car track; that it was going about twenty miles per hour; that he applied his brakes as soon as he saw the Buick car and was practically stopped when the impact occurred. He says that after the collision he backed up to pull the machines apart; that when he drove away there was no room to pass on the east side of the track and he passed on the west side.

The witness O'Connell says driving a truck and was two hundred or three hundred feet back of appellant's truck when the collision occurred. He says he drove up to the scene of the collision and found the right wheels of appellant's truck and was left blind between the rails of the street car track. Another witness was driving a truck and at the time of the impact was about twenty feet behind appellant's truck. He says he stopped, left his truck and walked around appellant's truck and the right wheels and the left wheels of the Buick were between the rails of the street car track; that the machines were driven together and the driver of appellant's truck reversed and parked them.

It clearly appears from the testimony of the three truck drivers that immediately after the collision the Buick and

appellant's truck were astride the west rail of the street car track. Appellee's son says the Buick was not on the track until after the collision. He does not say that it was there immediately following the impact or that it was there as a result of the collision. If the Buick was nine feet west of the west rail of the street car track when the collision occurred and the impact knocked it back three or six feet as appellee's son testified, it is difficult to understand how both vehicles could be astride the west rail of the street car track immediately after the impact. If the collision was head-on as all the witnesses said, we cannot see how both vehicles could be in the position they were immediately after the impact. There is no conflict in the evidence as to the position of the vehicles at that time. Appellee offered no evidence to show why they should be in that position.

In the state of the proof we would not be warranted in affirming the judgment. It is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported

...plaintiff's truck were within the rear end of the street car.
...plaintiff's son says the truck was not on the track when it
...collision. He does not say that it was in collision with the
...impact on that it was there as a result of the collision.
...he says was also last seen at the same place as the street car.
...right after the collision occurred and the impact occurred at
...used on six feet as appellant's son testified, it is difficult to
...understand how both vehicles could be within the rear end of the
...street car track immediately after the impact. If the collision
...as based on all the witnesses said, no doubt the two cars
...vehicles could be in the position they were immediately after the
...impact. There is no conflict in the evidence as to the position
...of the vehicles at that time. Appellant offered no evidence to
...show why they should be in that position.
...In the state of the case as it would not be necessary
...to bring the impact. It is necessary to show the facts
...of the case.

Not to be reported

TERM NO. 15.

AGENDA NO. 35.

In The
APPELLATE COURT OF ILLINOIS
Fourth District
OCTOBER TERM, A. D. 1929.

FILED

FEB 12 1930

EDWARD MORGENSTERN and
SYBIL MORGENSTERN,
Appellees,

vs.

MISSISSIPPI COAL
CORPORATION,
Appellant.

Appeal from the Circuit
Court of Perry County.

Hon. Jesse R. Brown,
Judge Presiding.

Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

OPINION BY NEWHALL, J.

256 I.A. 616

This is an appeal from a decree correcting the description of lands in an option agreement executed by the parties in which it was claimed that there was a mutual mistake with reference to the description.

Appellees owned one hundred and twenty acres of land in Perry County, forty acres in Section 35 known as the "Home Place" and eighty acres in Section 20 known as the "Campbell Eighty." Appellant, through its agents, was procuring options for the purchase of coal lands in Perry County and one Galloway was its agent and representative in that behalf. In June, 1927, Galloway interviewed appellee, Edward Morgenstern, stating that he desired an option for the benefit of appellant on all of appellees' lands, and Morgenstern agreed to give an option on the Campbell Eighty but refused to option the forty acre Home Place. As a result of the interview it was agreed between Galloway, who was then acting as agent for appellant, ~~that he~~ was to go to the home of appellees' and get from the wife of Morgenstern certain tax receipts in order to procure a correct description of the Campbell Eighty to be inserted in the option which

In The

APPELLATE COURT OF THE STATE

FOR THE DISTRICT OF

OKLAHOMA TERM, A. D. 1909.

JOHN A. BERRY, Plaintiff,

vs. HOWARD NORTHWESTERN and
SYLIL NORTHWESTERN,
Appellees.

vs.

MISSISSIPPI COAL
CORPORATION,
Appellant.

OPINION BY THE COURT.

This is an appeal from a decree rendered in the District of
land in an option agreement entered by the parties in 1904. It
claimed that there was a mutual mistake in the description of the
description.

Appellees owned one hundred and twenty acres of land in
County, forty acres in Section 35 and the balance in

ely acres in Section 35 known as the Mississippi claim.

Appellant, through its agents, was purchasing land for the purpose
of coal lands in Perry County and the balance in the same and

representative in that behalf. In 1904, appellees, Howard
appellees, Howard Northwestern, stated that he had an option for

the benefit of appellant on all of appellant's lands, and appellant
agreed to give an option on the same to appellant, and appellant

the forty acre tract. As a result of the testimony it was
agreed between appellees, who was then making an appeal for appellant

was to be to the benefit of appellant, and the tract was to be
Northwestern certain tax receipts in order to prevent a certain
caption of the Mississippi claim to be inserted in the option

was signed in blank by Morgenstern. Galloway testified that he did not have any agreement with appellees to option the Home Forty; that he went to the home of appellees' and procured certain descriptions from the tax receipts furnished by Mrs. Morgenstern; that through his error and mistake he inserted in the option a description of lands which included the "Home Forty", and at the time he supposed he was only inserting a description of the "Campbell Eighty." Morgenstern had been acquainted with Galloway for several years and relied upon him to insert the proper description of lands that appellees had agreed to give an option for. The option called for eighty acres, which was the amount of land appellees had agreed to option and Morgenstern testified he was willing at any time to carry out the option that Galloway and he had intended to make covering the eighty acres in Section 20. The evidence shows that the so-called "Home Forty" was situated about four miles from the "Campbell Eighty", being improved and actually worth much more than the price agreed upon in the option contract. The testimony is undisputed that the forty acre tract in Section 35 was not to be optioned. Morgenstern did not see the option, after the description had been inserted by Galloway, and he first learned that the Home Place had been included, through error, when he received a letter from appellant, advising that the option would be accepted and that appellant was willing to pay the purchase price of eight thousand dollars for all of the one hundred and twenty acres of land. At the time of the execution of the option, although the agreement recited the receipt of one dollar consideration for the same, the evidence shows no money in fact was paid to appellees.

The bill of complaint charges that a mutual mistake was made and prays that the option contract may be reformed to correct the mutual mistake of the parties made in the execution thereof and prays that the same may be reformed to correctly describe the premises intended to

was signed in blank by Morgenthaun. Morgenthaun testified that he did not have any agreement with appellee to option the "Home Forty", and he went to the home of appellee, and secured certain information from the tax receipts furnished by Mrs. Morgenthaun. Morgenthaun testified that he inserted in the option a description of land error and mistake he inserted in the option a description of land which included the "Home Forty", and at the time he signed the option only inserting a description of the "Campbell Tract". Morgenthaun had been acquainted with Galloway for several years and relied upon him to insert the proper description of land in the option and agreed to give an option for. The option called for eighty acres which was the amount of land appellee had agreed to option and Morgenthaun testified he was willing at any time to carry out the option that Galloway and he had intended to make covering the eighty acres in Section 20. The evidence shows that the so-called "Home Forty" was situated about four miles from the "Campbell Tract", but improved and actually worth more than the price agreed upon in the option contract. The testimony is undisputed that the "Home Forty" tract in Section 20 was not to be optioned. Morgenthaun testified that the option, after the description had been inserted by Galloway, was his first lesson that the Home Place had been included, and when he received a letter from appellee, advising that the option would be accepted and that appellee was willing to pay the purchase price of eight thousand dollars for all of the one hundred and twenty acres of land. At the time of the execution of the option, Morgenthaun testified that the receipt of one dollar consideration for the same, the evidence shows no money in fact was paid to appellee. The bill of complaint charges that a mutual mistake was made and prays that the option contract may be relieved of its effect and that mistake of the parties made in the execution thereof be set aside and the same may be returned to Morgenthaun for the purpose of depositing the

be optioned by the said parties.

The answer of appellant denied the material allegations of the bill.

The cause was referred to a Master to take proofs and report his conclusions of law and fact and, after a hearing, the Master found the issues in favor of appellant and recommended dismissal of the bill. Objections and exceptions were filed to the Master's report and the Court, on the hearing of the exceptions, sustained the same and entered a decree in favor of appellees.

The decree finds that Galloway acted as agent for appellant and appellees in the writing in of the description of the premises included in said option contract; that by mistake of the said Galloway the said forty acre tract, known as the "Home Place", was erroneously written into the option contract and that this mistake was the mutual mistake of appellant and appellees and decreed that the option contract be reformed by the elimination therefrom of the description of said forty acre tract.

Appellant contends that Galloway was the agent of appellees in the writing in of the erroneous description in the option contract, and under these circumstances, it could not be said that the mistake of Galloway was a mutual mistake of both parties to the contract. The proof is undisputed that Galloway was acting as agent for appellant in the securing of this option contract. The evidence shows, and it is conceded by appellant, that a mistake was made by Galloway in writing in an erroneous description of the particular property which appellees had agreed to give an option thereon to appellant. Galloway was acting as agent in the securing of the option, and in the writing in of the description, it is clear that he was acting as agent for both parties. The mistake of a person acting as the agent of both parties to a contract

be obtained by the said parties.

The answer of appellant denied the material allegations of the

bill.

The cause was referred to a master to take evidence and report. The conclusions of law and fact and, after a hearing, the master found issues in favor of appellant and recommended dismissal of the bill. Objections and exceptions were filed to the master's report and the court, on the hearing of the exceptions, sustained the same and entered a decree in favor of appellee.

The decree finds that railway acted as agent for appellant in appellee in the writing in of the description of the premises located in said option contract; that by virtue of the said railway the said forty acre tract, known as the "Stone Branch", was subsequently written into the option contract and that this writing was the actual basis of appellant and appellee and decreed that the option contract be reformed by the elimination hereof of the description of said forty acre tract.

Appellant contends that railway was the agent of appellee in the writing in of the erroneous description in the option contract, and under these circumstances, it could not be said that the writing of railway was a material alteration of the contract. The court is undisputed that railway was acting as agent for appellant in the securing of this option contract. The answer shows, and it is conceded by appellee, that a writing was made by railway in relation to an erroneous description of the premises located in said option contract. It is agreed to give an option known to appellant. Railway was acting as agent in the securing of the option, and in the writing in of the description, it is clear that he was acting as agent for both parties. The mistake of a person acting as an agent is not binding on a principal.

may be mutual so as to warrant correction by a court of equity.

Warrick v. Smith, 137 Ill. 504; 34 Cyc. 919.

A court of equity will reform a deed, or other instrument of writing, upon the ground of mistake, providing the following is shown by the evidence: first, that the mistake was one of fact and not of law; second, that the proof clearly and convincingly shows that a mistake was made; and third, that the mistake was mutual and common to both parties to the instrument. Skelly v. Ersch, 305 Ill. 126. The mistake in this case was one of fact and it is undisputed that a mistake was made by Galloway in copying into the option agreement in question an erroneous description whereby certain lands were inserted in the contract which had not been intended by the parties to be placed therein.

Counsel for appellant urge that the mistake made by Galloway, arose out of the negligence of appellees, in permitting appellant's agent to write into the option agreement a description after appellees had signed the option agreement in blank and delivered the same to Galloway. The proof shows that appellees had no knowledge that Galloway had inserted an erroneous description, until sometime after the making of the contract when appellant sought to avail itself of the provisions of the option, and when appellees then discovered the mistake an immediate effort was made on their part to have the mistake corrected. Appellant declined to correct the mistake and sought to take advantage of the error and mistake of their agent, Galloway.

The rule is, that negligence, to bar the reformation of a deed in case of mutual mistake, must be so gross as to amount to a violation of a positive legal duty. Estoppel does not arise where the act of the party sought to be estopped was due to ignorance by reason of an innocent mistake. It is also a necessary element of

may be essential to us to prevent serious damage to the country.

Wattick v. Smith, 137 Ill. 504; 100 Ill. 500.

to be placed therein.

[illegible]

The act of the party cannot be excused on the ground that it was done in violation of a positive law. The act of the party cannot be excused on the ground that it was done in violation of a positive law. The act of the party cannot be excused on the ground that it was done in violation of a positive law.

estoppel that the party relying upon the representations made was misled to his injury and suffered loss of a substantial character, or has been induced to alter his position for a worse in some material respect. *Skelly v. Ersch*, supra. In this case appellant never paid any money on the option in question, with the exception that appellees acknowledged the receipt of onedollar as consideration, and the evidence does not show that appellant has suffered any loss or injury by reason of the alleged making of the contract in question. This case does not involve in any way the rights or interests of innocent third persons, and it is highly inequitable and unjust to order appellees to sell to appellant lands that they had not intended to sell and which appellant's agent had not intended to buy. It is clearly inequitable and unjust to permit appellant to take advantage of the error and mistake of its agent in view of all the admitted facts shown by this record. It has long been settled law that a court of chancery may reform a written instrument so as to correctly state the agreement of the parties. *Sallo v. Boas*, 327 Ill. 145. The knowledge of the facts by an agent, contracting business for a corporation, is the knowledge of the corporation and his acts are the acts of the company. *Franklin Life Ins. Co. v. The People*, 200 Ill. 619.

The last contention of appellant for reversal is that the decree was erroneous in eliminating from the option the description of the forty acres in question. The bill prayed for this relief and we find that the evidence was sufficient to support the decree, and if appellant was desirous of having the description reformed so as to correctly describe the so-called "Campbell Eighty" it should have filed a cross-bill asking for this relief. It appears from the record that appellees were ready and willing to comply with the terms of the option so far as the so-called "Campbell Eighty" was concerned, and it appears

[illegible]

from the record that appellant did not wish to exercise its option as to the "Campbell Eighty" unless it included therewith the so-called "Home Forty". The decree was in conformity with the facts stated in the bill and the prayer thereof and is in our judgment sufficient.

Shields v. Bush, 189 Ill. 534.

We are of the opinion that the circuit court did not err in granting the relief prayed for in the bill and in reforming the option contract in accordance therewith. The decree of the circuit court is therefore affirmed.

Decree affirmed.

Not to be reported

from the record that appellant did not also to consider the matter in
to the "Campbell-Wright" which is further described in the
"Fore Party". The device was in one of the "Fore Party" which is
the bill and the proper thereof as to the "Fore Party" which is
Wright v. Dean, 120 Ill. 584.
We are of the opinion that the device is not in the
the relief prayed for in the bill and is not in the
contract in accordance therewith. The device of the device is
therefore affirmed.

Very respectfully,
J. H. Wright

Not to be reported

TERM NO. 22.

AGENDA NO. 10.

In The
APPELLATE COURT OF ILLINOIS

Fourth District

OCTOBER TERM, A. D. 1929.

FILED

FEB 12 1930

Robert B. Hooper
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILL.

HARRY DORTCH, Administrator of
the Estate of EVA DORTCH,
Deceased,

Appellant,

vs.

ALTON AND EASTERN RAILROAD
COMPANY,

Appellee.

Appeal from the Circuit
Court of Madison County.

Honorable Louis Bernreuter,
Judge Presiding.

256 I.A. 616²

OPINION BY NEWHALL, J.

The present appeal is from a judgment of the Circuit Court of Madison County in favor of appellee and against appellant in bar of the action and for costs.

Appellant's intestate, Eva Dortch, was thrown from a truck, in which she was riding, underneath the wheels of appellee's freight train on the night of September 24, 1928, and killed. Deceased lived at Granite City with her husband and five minor children, and was, with a number of other people, on her way to attend a church meeting. The truck had about twenty people in it and at the time of the accident was being driven by one Mathews in a southerly direction upon what is known as the Edwardsville hard road.

Appellee is a railroad corporation operating a railroad track in an easterly and westerly direction across said public highway at grade. The railroad tracks cross said highway at an angle, making a curve as the railroad approaches from the west to and over the said crossing. This railroad was used for the operation of freight trains and on the night in question appellee was operating one of its said freight trains, consisting of an engine, tender and fifty-seven freight cars, in an easterly direction over the said crossing. It was dark. The engine was reversed, the head or front of the engine

In the

APPELLATE COURT OF INDIANA

Fourth District

DETROIT, MICHIGAN, 1917.

HARRY DORTCH, Administrator of the Estate of W. A. DORTCH, Deceased,

Appellant,

ARTON AND EASTERN RAILROAD COMPANY,

Appellee.

OPINION OF THE COURT

The present appeal is from a judgment of the Circuit Court of Madison County in favor of appellee and against appellant in and to the effect that the action and for costs.

Appellant's interest, W. A. Dortch, was killed, from a train, which was killed, underneath the wheels of appellant's freight train on the night of September 24, 1915, and killed. Deceased lived at Hamilton City with her husband and three minor children, and was, with a number of other people, on her way to attend a church meeting. The train had about twenty people on it and at the time of the accident was being driven by one William A. Dorch, in the direction upon what is known as the Louisville and Nashville road.

Appellee is a railroad corporation, operating a freight road in an easterly and westerly direction across the middle of Indiana. The railroad tracks cross and diverge at an angle, forming a curve as the railroad approaches the town and just over the town. This railroad has had for the operation of its freight trains and on the night in question appellant was operating one of its freight trains, consisting of an engine, tender and three or four freight cars, in an easterly direction over the main line. It was dark. The engine was covered, the back of the train was in

facing west and pulling the fifty-seven freight cars. The tender was in front of or the east of the rear end of the engine. There was a heavy traffic along the Edwardsville road both day and night, consisting mostly of automobiles. It was the main highway from the north to St. Louis and East St. Louis on the south, and at the time of the collision there were a number of automobiles traveling in both directions over said crossing. The evidence of all the witnesses who testified for the plaintiff and who were passengers in the said truck, shows that appellee's freight train approached said crossing without any headlight burning and without any bell or whistle, and the first the people in the truck saw was a dark object approaching and almost upon them. At this time the front end of the truck was on the railroad track. This truck had stopped at the regular stopping place where Twentieth Street meets the Edwardsville road; this was several hundred feet north of the intersection. While the truck was stopped at this point an automobile driven by L. B. Patton drove south on the Edwardsville road past the truck, and the truck pulled into the Edwardsville road and followed the Patton car down towards the intersection. Another car driven by Fred Stork passed the truck about seventy-five or one hundred feet north of the intersection and barely escaped being struck by the tender of the train. There was no light or warning of any kind seen by Patton or Stork, or anyone in the truck. The front of the tender struck the truck on the right hand side near the right front wheel and cab door, demolishing the truck, and appellant's intestate was run over and killed by the train. As the train approached the intersection the engineer saw a number of cars passing up and down the hard road. He saw the Stork car that the engine barely missed and the engineer did not apply his emergency brake until after the tender had struck the truck. When the train stopped the engine and tender and a part of the first box car had passed entirely over the hard road.

The truck was being driven at a moderate rate of speed; it had no top or cover except a cab over the driver's seat. Back of the cab

Facing west and pulling the fifty-ton freight car. The car was in front of at the east of the west end of the bridge. There was a heavy traffic along the Edgewood road with east and west, consisting mostly of automobiles. It was the main highway from north to St. Louis and East St. Louis on the river, and at the time of the collision there were a number of automobiles traveling in both directions over said crossing. The evidence of all the witnesses who testified for the plaintiff and who were present at the time truck, shows that applicant's freight truck approached said crossing without any hesitancy or delay and without any signal or responsibility the first the people in the truck saw was a light on the truck and almost upon them. At this time the driver of the truck was on the railroad track. This truck had stopped at the crossing stopping place where Twelfth Street meets the Edgewood road. This was several hundred feet north of the intersection. While the truck was stopped at this point an automobile driven by T. A. Patton drove south on the Edgewood road past the truck, and the truck pulled into the Edgewood road and followed the Patton car south towards the intersection. Another car driven by Fred Clark passed the truck about seventy-five or one hundred feet north of the intersection and barely escaped being struck by the truck. There was no light or warning of any kind given by Patton or Clark or anyone in the truck. The front of the car, which struck the truck, the right hand side near the right front wheel and the front fender, hitting the truck, and applicant's testimony was that the truck was moving the train. As the truck approached the intersection the driver saw a number of cars passing on the road and was told by the driver that the car was heavily loaded and the driver of the car applied his emergency brake and after the train had stopped the car. When the train stopped the car was loaded and a light on the road box car had passed entirely over the road track. The truck was being driven at a moderate rate of speed at the time no top or cover except a cap over the driver's head.

the truck was open and the passengers were occupying long seats on either side of the truck, and two of the passengers were standing, leaning against the cab of the truck, and were facing in a south or southwestern position, the direction from which the train was coming. Appellant's intestate was sitting in the rear of the truck, holding one of her children in her lap, and had nothing to do with the driving of the truck or any means or opportunity of controlling its movements.

The truck had a wide seat in the cab and this seat was occupied by the driver, who sat on the left, and the two young ladies who were sitting next to him. The lady sitting next to him was thrown from the truck and killed and the other girl was badly injured.

The declaration consisted of four counts. The first count was a general charge of negligence in the management and operation of said train, and that plaintiff was in the exercise of due care for her own safety; the second count alleged negligence of appellee in operating said freight train over the public highway without giving sufficient warning of its approach and without having a sufficient headlight to warn the public using said highway. The third count charged violation of Paragraph 187, Chapter 114, of the Revised Statutes of Illinois, entitled, "Headlights on Locomotive Engines," charging that defendant was a common carrier of freight and that it was its duty to comply with the said statute in respect to headlight, and the fourth count charged negligence in running its train across said highway without having a bell or whistle as provided by statute.

The testimony of the trainmen and other witnesses offered on behalf of appellee tends to show that appellee maintained a sufficient headlight on its engine and that its trainmen gave due warning of the approached of the train by bell and whistle.

The court gave to the jury ten instructions on behalf of appellee and counsel have argued that four of these instructions were erroneous and that the giving of the same constituted reversible error under the facts shown by this record.

one of her children in her lap, and another in her arms. The driver of the truck at that time or any means or opportunity of controlling the

The truck had a wide seat in the back and this seat was occupied by the driver, who sat on the left, and the two young ladies who were sitting next to him. The lady sitting next to him was from the truck and killed the other lady and took her to the

The decoration consisted of four medals. The first medal was a general change of position in the management and direction of said train, and that plaintiff was in the service at the time for her own safety; the second award was of assistance of services operating said freight train over two miles without delay or interruption; of the amount of the reward was \$100.00. The third medal was given to him for his efforts in saving the lives of the passengers.

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and that the living of the same conditions were not the same as those shown by the record.

Appellee's given instruction No. 7 was peremptory as to the facts alleged in the second count of the declaration. The said count charged that the appellee operated its train to and over said public highway without sufficient warning of its approach and without a sufficient headlight to warn the public using said highway. This instruction was erroneous because it directed a verdict as to the second count, without stating all of the essential elements of that count. The instruction did not require proof that the jury believe from the evidence that "sufficient warning" was given or that a "headlight sufficient to warn the public" was burning upon the approaching end of the locomotive, and the jury were precluded by the wording of the instruction from finding that sufficient warning under all of the circumstances might require the bell and whistle to be sounded as required by statute. *Suburban R. R. Co. v. Balkwill*, 195 Ill. 535.

Appellee's eighth instruction was as follows: "The court instructs the jury that if you believe from the evidence that the driver of the truck could have seen defendant's approaching train if he had looked upon driving upon the track, and that he could have heard defendant's approaching train if he had listened before driving upon the track, but that he failed either to look or to listen, you should find the defendant not guilty; provided, you further believe from the evidence that such failure of the driver of the truck to look and listen was the sole cause of the accident."

We think the foregoing instruction was misleading and erroneous in being so worded that it might lead the jury to believe that the trial court thought that the accident was caused entirely by the negligence of the driver of the truck. We think it also subject to the criticism that the jury might be lead to believe that the negligence of the driver of the truck would necessarily be imputed to appellant. While deceased was liable for her own negligence she was not necessarily liable under the law for the negligence, if any, of the driver of the truck. The negligence of a driver, in sole

Appellate's five instructions to the jury, the court
alleged in the second part of the instruction. The court
stated that the appellee testified that he saw the
highway without evidence showing to the contrary and
appellant testified to have the right of way. The
instruction was erroneous because it implied a finding as to the
second count, without stating all of the essential elements of same.
The instruction did not require proof that the party
from the evidence that appellant presented was guilty of
negligent failure to warn the public, and that, upon the
approaching end of the highway, and the jury was required to
find of the instruction that finding that appellant caused other
all of the circumstances of the case to be such as to
warrant as required by statute. (Appellate's 5th instruction)

105 Ill. 335

Appellate's fifth instruction was in error. The court
instructed the jury that it was believed that the evidence that the
driver of the truck would have been negligent in not seeing that
he had looked upon driving upon the road, and that he could have
heard defendant's approach, and that he failed to do so. The
upon the truck, but that he failed to do so. The court
should find the defendant not negligent. The court
from the evidence that each of the elements of the cause of action
look and listen was the sole cause of the accident.
The court's fifth instruction was misleading and erroneous
in being so worded that it implied that the jury is believed that the
trial court should find that defendant was negligent. The court
negligence of the driver of the truck. The court's fifth instruction
to the jury that the jury should find that the driver of the truck
negligence of the driver of the truck would constitute the cause
to appellant. While the court's fifth instruction was misleading and
was not necessarily liable upon the facts of the case, it was
of the driver of the truck. The court's fifth instruction was

charge of a vehicle, cannot necessarily be imputed to a passenger in the vehicle. A passenger in a vehicle, if he is caring for his own interests and safety should, when he learns of a threatened accident and has an opportunity to avoid it, warn the driver of the vehicle. *Swanlund v. Rockford Ry. Co.*, 305 Ill. 339. The proviso of this instruction is insufficient to cure that which preceeds it, in that the jury are not required to find as a condition precedent to non-liability of the defendant that the sole cause of the injury to the plaintiff was due to the negligent conduct of the driver of the truck. Whether, under all the circumstances, the driver's conduct was sufficiently negligent as to be the sole cause of the injury was not fairly submitted to the jury by this instruction. *Landon v. C. & G. T. Ry. Co.*, 92 Ill. App. 216. *Swanlund v. Rockford Ry. Co.*, supra.

Appellee's ninth instruction is erroneous, in that it assumes as a fact, that the driver of the truck was negligent without requiring the jury to find that fact. There were no facts shown on the trial which would warrant the jury in imputing to the deceased any alleged negligence of the driver of the truck, and the giving of this instruction was calculated to advise the jury that the accident was caused by the negligence of the driver of the truck. *Landon v. C. & G. T. Ry. Co.*, supra.

Appellee's tenth instruction is subject to criticism, in that the jury were again advised concerning the negligence of the driver of the truck, and was calculated to lead the jury to believe that if the driver of the truck was negligent the same would be imputed to the deceased. The proof on the part of appellant tended to show that appellee was negligent in failing to give sufficient warning of the approach of appellee's train. If this alleged negligence of appellee was also a proximate or concurring and efficient cause of the accident which the evidence tends to show, then appellee would be liable, the other necessary proof being made, notwithstanding the negligence of the driver may have contributed to the injury. It is sufficient if the combined negligence of the driver of the truck

of a vehicle, cannot necessarily be limited to a particular
the vehicle. A passenger in a vehicle is liable for the
interests and safety should, upon the basis of a negligent collision,
and has an opportunity to avoid it, and the driver of the vehicle,
Swain v. Rockford Ry. Co., 339 Ill. 45. The finding of this
instruction is insufficient to state that which appears to be, in fact,
the jury are not required to find as a matter of course, the
liability of the defendant that the sole cause of the injury to the
plaintiff was due to the negligent conduct of the driver of the train.
Further, under all the circumstances, the driver's conduct was
sufficiently negligent as to be the sole cause of the injury was not
fairly submitted to the jury by this instruction. Swain v. Rockford Ry. Co., 339 Ill. 45.
T. Ry. Co., 93 Ill. App. 215. Swain v. Rockford Ry. Co., 339 Ill. 45.
Appellee's ninth instruction is erroneous, in that it states
as a fact, that the driver of the train was negligent in
requiring the jury to find that fact. There was no fact in issue
the trial which would warrant the jury in finding as the sole cause
any alleged negligence of the driver of the train, but the finding of
this instruction was calculated to advise the jury that the accident
was caused by the negligence of the driver of the train. Swain v. Rockford Ry. Co., 339 Ill. 45.
Appellee's tenth instruction is erroneous, in that
the jury were again misled concerning the negligence of the driver
of the train, and was calculated to lead the jury to believe that
the driver of the train was negligent and was liable for the injury to
the decedent. The ground in the point of negligence being to state
that appellee was negligent is sufficient to show that the negligence
of the appellant of appellee's train. It is also sufficient to show that
appellee was also a negligent or negligent and negligent cause of
the accident which the evidence tends to show, that appellee was
liable, the other necessary facts being established.

and appellee caused the accident, and that the latter was an efficient cause without which the injury would not have resulted, the deceased having been in the exercise of ordinary care. Pullman Palace Car Co. v. Laack, 143 Ill. 242. C. & E. I. R. R. Co. v. Hines, 183 Ill. 482. Landon v. C. & G. T. Ry. Co., supra. The proviso of appellee's tenth instruction authorized the jury to find the defendant not guilty provided the jury found the defendant not guilty of negligence in the "operation of its said train." The train may not have been "operated" in a negligent manner by the trainmen and yet the company may have been guilty of negligence proximately contributing to the accident by reason of its failure to maintain a sufficient headlight as required by law and this was one of the issues in the case made by the pleadings and the proof. Further, the instruction was peremptory in its wording in omitting part of the issues in the case, and the giving of it was prejudicial to appellant.

We are of the opinion that these instructions did not fairly present to the jury the issues in the case made by the allegations of the declaration and the evidence in the record. There are no other instructions shown in the record which would operate to cure these instructions, or from which it could be said that the jury were not mislead, and the evidence being close and conflicting, required the giving of instructions which would be fair and correctly state the law applicable to the case.

For the errors in the giving of these instructions for appellee, in our judgment appellant should be permitted to present his cause to another jury under correct rulings as to the law. Judgment of the trial court will be reversed and the cause remanded to the Circuit Court of Madison County for a new trial.

Judgment reversed and cause
remanded for a new trial.

Not to be reported

[illegible]

was to be reported

TERM NO. 23.

AGENDA NO. 23.

In The

APPELLATE COURT OF ILLINOIS

Fourth District

OCTOBER TERM, A. D. 1929.

FILED

FEB 12 1930

Robert B. Fox
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

GOLDIE POE,
Defendant in Error,

vs.

A. H. WHITTINGTON,
Plaintiff in Error.

Writ of Error to the City
Court of East St. Louis.

Hon. William F. Borders,
Judge Presiding.

256 I.A. 616³

OPINION BY NEWHALL, J.

This was a suit for the recovery of damages for injuries alleged to have been received by defendant in error arising out of the collision of her automobile with an automobile being driven by plaintiff in error.

The first count of the declaration charged general negligence; the second, wilfull and wanton negligence, and the third count alleged that plaintiff in error operated his car at an excessive rate of speed. General issue was filed and trial before a jury resulted in a verdict finding the issues in favor of defendant in error and assessing damages at the sum of \$2500.00. The trial court submitted to the jury, over objection of plaintiff in error, two special interrogatories requesting the jury to find whether the injuries suffered by defendant in error were wilfully and wantonly inflicted by the plaintiff in error, both of which interrogatories were answered in the affirmative.

Motion for new trial was filed and the trial court, after directing a remittitur of \$750.00 from the verdict, overruled the motion and entered judgment for the amount of the verdict, less the remittitur.

The facts developed by the evidence show that the defendant in error on the morning of August 11, 1928, was driving a Ford coupe in a southerly direction upon Illinois Highway No. 3; that she was following a truck driven by one Fred Stickney and was travelling from seven

ALABAMA COURT OF APPEALS

IN THE

STATE OF ALABAMA

153

BORDIE, JR.,
 Defendant,
 vs.
 A. E. WILKINSON,
 Plaintiff.

2261A.016

ALABAMA COURT OF APPEALS

This was a suit for the recovery of damages for injuries

alleged to have been received by defendant in certain injuries, and the collision of his automobile with an automobile being driven by plaintiff in error.

The first count of the declaration charges damages for injuries

the second, third and fourth counts, and the fifth count

alleges that plaintiff's car was operated at the rate of an excessive

rate of speed. General issue was filed and trial before a jury

resulted in a verdict finding the driver in favor of defendant for

error and excessive damages of the sum of \$1000.00. The trial court

submitted to the jury, over objection of plaintiff's counsel, two

special interrogatories requesting the jury to find whether the

injuries suffered by defendant in error were of such a nature as to

indicate by the plaintiff in error, that he was negligent in

were answered in the affirmative.

Notice for new trial was filed and the trial court, after hearing

and a verdict of \$750.00 was rendered, setting aside the verdict

and entered judgment for the amount of the verdict, with the exception

Two facts developed in the evidence that the driver of

error on the morning of August 11, 1930, was driving a Ford coupe in

authorities directed upon Illinois. Evidence that it was the same vehicle

to ten miles per hour. The truck turned off to the left of the hard road on which she was driving; that while she was following the truck her view to the south was obstructed and immediately after the truck turned off the road the plaintiff in error's machine was driven at a high rate of speed northerly on the west half of the road and crashed into her car, causing it to swerve to the west of the concrete slab. As a result of the collision plaintiff in error lost control of his car and, after the collision, travelled about seventy-five feet into the ditch on the opposite side of the road. Several witnesses for defendant in error testified that plaintiff in error was intoxicated at the time of the collision and that his car was travelling at a high rate of speed, estimated at from fifty to sixty miles per hour.

Defendant in error's car was damaged and she received severe personal injuries to her back, limbs and ribs, the extent of which were proven by her own testimony and were not denied on the trial. There is no contention that the verdict, after remittitur, is excessive or not supported by the evidence in so far as damages are concerned.

The only witness for plaintiff in error was himself and he denied that he was under the influence of liquor and testified that his car was not going more than twenty-five miles per hour; that defendant in error's car was being driven on the wrong side of the road and that the accident was unavoidable.

Plaintiff in error contends that the court erred in reducing the amount of the verdict, on its own motion, without the consent of defendant in error and that the judgment entered is indefinite.

Defendant in error did not object to the action of the trial court in ordering a remittitur and in her brief counsel say that she consented to such remittitur. We are of the opinion that plaintiff in error is not in a position to urge that the trial court erred in reducing the amount of the verdict, and that the entry of judgment for \$175000 was sufficiently definite in view of the remittitur of \$750.00 from the verdict of \$2500.00.

to ten miles per hour. The truck turned off to the left of the
hard road on which she was driving; and while she was following
the truck her view to the south was obstructed and immediately
after the truck turned off the road the plaintiff in error's car
was driven at a high rate of speed northward on the west half of
the road and crashed into her car, causing it to swerve to the west
of the concrete slab. As a result of the collision plaintiff in
error lost control of his car and, after the collision, travelled
about seventy-five feet into the ditch on the opposite side of the
road. Several witnesses for defendant in error testified that
plaintiff in error was intoxicated at the time of the collision and
that his car was travelling at a high rate of speed, estimated at
from fifty to sixty miles per hour.

Defendant in error's car was damaged and she received severe
personal injuries to her back, limbs and ribs, the extent of which
were proven by her own testimony and were not denied on the trial.
There is no contention about the verdict, after remission, is excessive
or not supported by the evidence. It is true an appeal was taken, but
The only witness for plaintiff in error was himself and he testified
that he was under the influence of liquor and testified that his car
was not going more than twenty-five miles per hour. That defendant in
error's car was being driven on the wrong side of the road and that
the accident was unavoidable.

Plaintiff in error complains that the court erred in rendering
the amount of the verdict, on the new action, without the consent of
defendant in error and that the judgment entered is excessive.
Defendant in error did not object to the entry of the trial
court in ordering a remission and in her brief counsel for defendant
consented to such remission. The use of the phrase "that plaintiff
in error is not in a position to urge that the trial court erred in
reducing the amount of the verdict, and that the entry of judgment
for \$15000 was sufficiently justified in view of the conduct of
\$150.00 from the verdict of \$15000.00.

It is a well settled rule that a party cannot avail of error which does not operate to his prejudice and that he cannot take advantage of error which operates to his advantage. *Miller v. Whelan*, 158 Ill. 544. Plaintiff in error does not urge that, after the remittitur, the judgment represents excessive damages allowed defendant in error for her injuries.

Plaintiff in error's next contention is that the court erred in submitting to the jury two special interrogatories as to whether the acts of plaintiff in error were wilfull and wanton at the time of the commission of the alleged injuries.

Where a declaration consists of several counts charging general negligence, and a count charging wilfull and wanton negligence, it is proper practice for a trial court to submit to the jury special interrogatories as to whether the defendant was guilty or wilfull or wanton negligence, providing there is evidence tending to prove the wilfull and wanton count and the jury are otherwise properly instructed as to what constitutes wilfull or wanton negligence. *Chicago City Ry. Co. v. Jordan*, 215 Ill. 390. *VanMeter v. Gurney*, 240 Ill. App. 165.

There was ample testimony in the record tending to show that plaintiff in error was guilty of at least constructive wilfull or wanton negligence and the court instructed at the request of plaintiff in error as to what was necessary to be proved under the wilfull and wanton count.

Plaintiff in error's third and final contention is that the court erred in the giving of the one instruction offered on behalf of defendant in error. The abstract of record shows nine instructions given at the request of plaintiff in error fully advising as to the law in the case, and only one instruction given on behalf of defendant in error. There appears no objection or exception in the abstract of record to the giving of defendant in error's one instruction. Rule 14 of this court requires that an abstract must be sufficient to present fully every error relied upon and where

It is a well settled rule that a party cannot claim an error

which does not operate to his prejudice and that he cannot claim

advantage of error which operates to his advantage. 111 Ill. 2d 544.

Therein, 158 Ill. 544. Plaintiff's error does not operate to his

the result, the judgment rendered is not erroneous.

defendant in error for his mistake.

Plaintiff in error's case consists in that he could not

submitting to the jury two special interrogatories as to whether the

acts of plaintiff in error were willful and malicious at the time of the

commission of the acts in issue.

Where a declaration consists of several counts, each count

negligence, and a count charging willful and malicious negligence, it

is proper practice for a trial court to submit to the jury special

interrogatories as to whether the defendant was guilty of willful or

wanton negligence, provided there is evidence tending to prove the

willful and wanton conduct and the jury can otherwise properly

instructed as to what constitutes willful or malicious conduct.

Chicago City Ry. Co. v. Tolson, 115 Ill. 520, 100 Ill. 2d 520.

158 Ill. App. 165.

There was ample testimony in the record tending to show that

plaintiff in error was guilty of at least one of the acts in issue

wanton negligence and the court instructed the jury on the request of

plaintiff in error as to what was necessary to prove willful and

and wanton conduct.

Plaintiff in error's third and final contention is that the

court erred in the giving of the two interrogatories offered by

defendant in error. The standard of proof under the instructions

given at the request of plaintiff in error was "beyond a

reasonable doubt" and the law is to the effect that the instructions

defendant in error. There was no evidence in the record

the abstract of record in the case of defendant in error's

instruction. This is an error which cannot be corrected by

be sufficient to present fully every other point raised and shown

exceptions to the rulings of the trial court are not preserved in the abstract the same will not be considered in the reviewing court. People v. Raboin, 316 Ill. 75. Notwithstanding the want of exception properly preserved we have considered counsels' objection to said instruction and are of the opinion, in view of the fact it was undisputed that the respective cars collided while going in opposite directions, that there was no reversible error in the giving of the instruction and that the said instruction did not assume a disputed fact or mislead the jury.

Accordingly the judgment of the City Court of East St. Louis, for the reasons aforesaid, is hereby affirmed.

Affirmed.

Not to be reported

exceptions to the rule of the trial court and the court in
the abstract the case will not be considered in the various cases.
People v. Hobbs, 311 Ill. 32. In this case, the court in
exception properly reserved to the court the right to modify the
to said instruction and one of the questions, in view of the fact it
was undisputed that the respective and definite will was in
opposite directions, that there was no reasonable ground for the
of the instruction and that the will instruction was not correct
disputed fact or mislead the jury.
Accordingly the instruction of the city court is set aside,
for the reasons above stated, is hereby affirmed.

That to be reported

IN THE

APPELLATE COURT OF ILLINOIS.

FOURTH DISTRICT.

May Term, A. D. 1929.

FILED

FEB 13 1930

Robert B. Proctor
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOISS. J. GEE, Trustee,
Defendant in Error,

vs.

GEORGE C. HOEPPNER, et al.,
Plaintiffs in Error, and
KARL Glover, et al.,
Defendants in Error.Petition for Writ of
Error to the Circuit
Court of Lawrence
County.256 I.A. 616⁴

Opinion by Judge Fred G. Wolfe.

The record in this suit is brought here on a writ of error directed to the circuit court of Lawrence County for the purpose of reviewing the case on error assigned, namely, that the decree of the lower court is not supported by the law and the evidence in the case. The suit was begun by one S. J. Gee, a trustee as hereinafter set forth, filing a bill of interpleader. There was a hearing before the Chancellor who rendered the decree to which exceptions are taken.

The record discloses that the Developed Oil Properties Company, a Wisconsin Corporation of Eau Claire, had agreed to pay to the Gordon Trust Company the sum of \$75,000.00 for oil and gas leases on property in Caddo County, Oklahoma. The said oil company required about \$25,000.00 to make the initial payment on such purchase price. In April, 1921, A. R. Manley, president of the Developed Oil Properties Company, and one A. R. Henley, a stockholder of the company, entered into negotiations with S. J. Gee, a defendant in error, and his son and one Tyler L. Andrews for a loan to make the initial payment. At that time S. J. Gee was president and his son cashier of the Farmers State Bank of Lawrenceville, and

Tyler L. Andrews was president of the Knox Bank and Trust Company of Vincennes, Indiana. As a result of these negotiations, a loan of \$27,500.00 was made to the oil company, which was evidenced by its four promissory notes of \$6875.00 each, and secured by an assignment of an oil and gas lease, known as the "Leighty Lease" situated in Lawrence County, Illinois, to S. J. Gee as trustee for the legal holders of the four promissory notes. All of these four notes were fully paid by the trustee from income received from the lease before maturity, and there is no controversy concerning these. On May 2, 1921 and while the four notes were still outstanding, the oil company borrowed \$65,000.00 and issued its twenty promissory notes for \$3250.00 each, which were made payable to S. J. Gee and sold to different persons. To secure the \$65,000.00 a new assignment was made to S. J. Gee as trustee of the "Leighty Lease" reciting the fact of the prior assignment to secure the \$25,000.00

To further secure the \$65,000.00 a similar assignment of an oil and gas lease in Caddo County, Oklahoma, and known as the "Cement Lease" was also made to S. J. Gee as trustee. The notes for \$3250.00 became due two a month and were to be paid by the trustee under the power conferred on him by the assignment from proceeds derived from the sale of oil under the leases. The income from the leases being insufficient to meet the notes as they fell due, the oil company and the trustee on July 15, 1922, entered into an agreement extending the time of the payment of \$36,000.00. that being then about the aggregate amount of these notes left unpaid. The unpaid notes were taken up and in their place twelve renewal notes of \$3,000.00 each, the first due September 1, 1922, and one each month thereafter, were made by the oil company and they were secured by the assignment as extended and confirmed by the agreement of July 15, 1922.

On September 1, 1922, the Oil Company executed another

assignment to the same trustee to secure forty bonds of \$500.00 each, bearing interest at seven per cent, with principals payable on the first and 15th of each month, beginning September 1, 1923, and continuing thereafter. The bonds were headed as follows: "United States of America. State of Wisconsin. Developed Oil Properties Company. Second Mortgage. Seven per cent bond." The bonds recited that they were secured by a mortgage or deed of trust of even date, acknowledged and delivered by the oil company to said Gee as trustee and duly recorded, conveying to said trustee the leaseholds situated in Lawrence County, Illinois, and Caddo County, Oklahoma, as more particularly specified in said mortgage or deed of trust. The mortgage or deed of trust thus referred to in the bonds being the assignment dated July 15, 1922. The assignment and trust instrument thus securing the bonds recited as follows: "It is expressly agreed that this trust deed or mortgage is subject to a certain other trust mortgage to the same trustee heretofore given and upon which there is approximately due at this time \$36,000.00, which said trust deed is recorded in the County of Lawrence, in the State of Illinois, and the County of Caddo, in the State of Oklahoma.

It was provided in all of these assignments and trust instruments that the trustee was to receive all the money derived from the sale of oil and gas from said leases; that it was to be used by him to pay the respective notes or bonds referred to in the assignments securing the respective loans; and that the oil company was to pay all operating expenses on said leases. The trustee operated the properties much of the time, but being unprofitable, he sold them. The "Leighty Lease" was sold in December, 1925, and the "Cement Lease" was sold in January, 1927. The net proceeds in cash from the sales was \$17,024.87.

In May, 1927, when the bill of interpleader was filed there were outstanding unpaid five of the \$3,000.00 notes which were secured by the extension agreement executed on July 15,

1922, and one note on which there was unpaid \$2,000.00 on the principal. Three of these first mentioned notes were claimed to be owned by plaintiffs in error; one was owned by S. J. Gee personally, and the note on which \$1,000.00 had been paid was owned by the Farmers State Bank of Lawrenceville, Illinois. Also in May, 1927, all the bonds were outstanding, except that the trustee had paid himself out of the income from the leases \$1500.00 to take up three bonds held by him personally. Interest had been paid on the bonds to September 1, 1925. The bonds were then owned as follows: Karl Glover \$3,000.00; First National Bank of Lawrenceville, Illinois, \$6,500.00; First National Bank of Bridgeport, Illinois, \$3,000.00; Tyler Andrews \$2500.00, all defendants in error, and one bond was owned by the Continental Supply Company.

The bill of interpleader, after setting forth such facts and circumstances as are above summarized, alleges that the holders of the notes and the holders of the bonds each claim priority out of the fund of \$17,024.07 in the hands of the trustee, to satisfy their respective securities. The decree was in favor of the bond holders on the question of the right of priority to the fund in the hands of the trustee, except that the trustee had erroneously paid himself individually \$1,500.00 for the three bonds held by him.

The decree is based upon the finding of fact by the Chancellor that the plaintiffs in error, namely, George C. Hoepfner, Knute Anderson, E. P. Degenhardt, A. T. Hoffman, P. C. Atkinson, C. P. Moses and E. L. Mason should be estopped from receiving priority in said fund for their notes claimed by them to be their individual property, for the reason that they bought the same knowing that the purchasers of the bonds, were making a loan to the Oil Company in reliance upon the representations of the company that the bonds would be paid before said notes.

Plaintiffs in error contend that the decree is contrary to the law and the facts in the case, relying on the proposition that a written contract cannot be contradicted by parole evidence; that the evidence does not show that the alleged representations were made by a duly authorized agent of the plaintiffs in error; and that neither the law nor the facts in the case justify the application of the doctrine of estoppel against the plaintiffs in error to claim priority in the fund.

As to the first proposition relied upon by the plaintiffs in error, we are of the opinion that the defendants in error (the bond holders) rely upon, that their rights and interests grew out of, the assignment made to the trustee dated September 1, 1922, and the bonds thereby secured, the two being construed together. They are bound by the rule that parole evidence is not admissible to vary or contradict the terms of a written agreement. Therefore, any parole evidence appearing in the case cannot be considered as a modification of the terms of the assignment making the notes a prior lien on the leaseholds. (Schultz v. Plankinton Bank, 141 Ill. 116)

The question to determine is whether the finding of the Chancellor is contrary to the manifest weight of the evidence, tested by the objections made to it by the alleged errors assigned by the plaintiffs in error. The burden of proof under the issues presented rested upon the defendants to establish the alleged estoppel as charged in their answer. (Williams v. Williams, 265 Ill. 64.)

The plaintiffs in error are seven of the nine directors of the Oil Company from the time of the negotiation of the first loan made by the company, until the company became defunct, during which time the rights of the owners of the notes and bonds became fixed. On September 14, 1923, the Farmers State Bank of Lawrenceville, Illinois, at the request of Geo, sent four of the notes now in question to the Union National Bank of Eau Claire, Wisconsin, with directions that

the same were to be delivered to Mr. Hoepfner upon the payment of the draft for \$13,860.21 drawn on Mr. Hoepfner. In September, 1923, Mr. Hoepfner was appointed trustee by the plaintiffs in error to take care of these notes and to relieve Mr. Gee of the responsibilities of operating the interests in the leaseholds. It was the understanding between the plaintiffs in error and Manley, the president of the Company, and one N. S. Sandahl, comprising the directors of the Oil Company, that each of them should advance one-ninth of the amount required to pay for the four notes attached to the draft. Manley and Sandahl never contributed their two ninths for this purpose.

Plaintiffs in error, on October 6, 1923, paid to the Union Bank \$9,333.34 on the draft, which paid for three of the notes and interest thereon. This amount was raised by the plaintiffs in error by each one of them paying Mr. Hoepfner, their trustee, the sum of \$1,700.00, receiving from Mr. Hoepfner a receipt, designated on its face as a "certificate" stating that each held a one-ninth interest in the notes for the plaintiff in error given the certificate. The amount paid by plaintiffs in error to Hoepfner, above the sum required to pay for the three notes was used by Hoepfner after he succeeded Gee, as trustee, for the plaintiffs in error, to pay indebtedness of the Oil Company, in the operation of the leaseholds and to increase the production of the wells. The notes have remained in the Union National Bank, Knute Anderson, secretary and treasurer of the Oil Company being cashier of that bank. ✓

The notes were not marked paid or cancelled, so far as the record in the case shows. The plaintiffs in error never received or demanded any interest on the notes. Plaintiffs in error all testified the notes were purchased by them individually to protect themselves, they being involved personally on other commercial paper of the Oil Company, and furthermore,

to get the notes in friendly hands to prevent foreclosure under the notes. Manley and Sandahl gave their note for \$2,000.00 to secure the balance due on the fourth note held by the Farmers State Bank of Lawrenceville; whether it was the intention of Manley and Sandahl to discharge the note or purchase it does not appear from the record. Neither was a witness in the case.

The answer of the defendants in error does not present the issue that the plaintiffs in error purchased or took up the notes while the Oil Company was insolvent, nor is the decree based on a finding that the dealings of the plaintiffs in error, in taking up the notes, were to their advantage after the company was insolvent or about to become so. The decree does not find that the defendants in error to their loss did forbear to bring suit to secure a foreclosure of their bonds because of representations made by the Oil Company or the plaintiffs in error. We are of the opinion that this Court is confined to the question whether the plaintiffs in error purchased the notes knowing that the Oil Company had made representations, or the plaintiffs in error themselves made representations, that the bonds would be paid before the notes, under such circumstances as to equitably estop them from claiming priority for the notes. (Arp v. Blake, 63 Cal. App. 362, 218 Pac. 773.)

There were twelve of the \$3,000.00 notes. The trustee Gee paid five of these notes on February 23, 1923, and two of them on September 23, 1923. The three claimed by plaintiffs in error were due May 1, June 1, and July 1, in the year 1923, and were paid by partial payment of the draft referred to on October 6, 1923. The notes were made payable to "Ourselves" (meaning the Oil Company) at the Farmers State Bank of Lawrenceville, Illinois, and endorsed by the company in blank. The record does not show that the plaintiffs in error had paid

or advanced any money to pay or take up any of the twelve notes not now in question. The title to the notes was transferable by mere delivery. The draft was drawn on Hoepfner, not the Oil Company. There is no evidence that the Oil Company paid the \$9,333.34, but to the contrary the evidence shows that the amount was paid by the plaintiffs in error from their personal property. The letter of instructions sent with the draft was not introduced in evidence, nor its contents proved. Under all the circumstances in the case we think it may be inferred that the holder of the three notes impliedly consented to the sale of the notes. (Kethoon v. Duncan, 96 U. S. 559, 24 Law. Ed. 363) The defendants in error did not suffer any loss or change their position in reliance upon belief of theirs that the Oil Company had paid or discharged the notes.

The representation relied upon in the case to create an estoppel in pais are testified to by the defendants in error, Glover, J. D. Madding, president of the First National Bank of Bridgeport, Illinois, Frederick Keller, president of the First National Bank of Lawrenceville, Illinois, and Tyler Andrews. Their testimony was to the effect that Hoepfner, in the presence of Manley, in 1924, about two years after defendants in error purchased the bonds, said to the bond holders "These notes have been taken up and you fellows are to come first and just be patient and we'll take care of you ahead of everything." That Manley said that the bonds were to come before the notes; and that he would "go on the stand and swear that I was authorized to make the notes a first lien on the property." On cross-examination Glover testified that Gee ~~did~~ state the bonds were a first lien on the leaseholds; none of the other defendants in error testified that Gee stated when the bonds were purchased that they were a first lien on the property. All of the defendant in error knew the bonds were

a second lien on the property at the time they purchased them. The knowledge acquired by the defendants in error after they purchased the bonds that the Oil Company may have decided, if it did so decide, by resolution or otherwise, to discharge the notes and make the bonds a first lien on the property did not influence the defendants in error to purchase the bonds. The defendants in error were not misled by any such alleged action of the Oil Company and the plaintiffs in error are not estopped to claim ownership of the three notes by reason of any such claimed action.- Rothgerber v. Dupuy, 64 Ill. 452; Straus v. Minzesheimer, 78 Ill. 492; Hempstead v. Broad, 275 Ill., 358. The decree is not sustained by the evidence.

The suit is remanded to the Circuit Court of Lawrence County with direction that a decree be entered directing the trustee Gee to pay from the funds in his hands as such trustee the costs of suit including the costs of this appeal; that so far as the remainder of said fund will extend, the said trustee pay himself the sum of \$1500.00 and he take nothing further in satisfaction of the three bonds at one time held by him, which amount and his receipt of the \$1500.00 for his three bonds shall be for his compensation as such trustee; and that the balance of said fund be paid to the holders of the five notes with interest in order of their maturity, less any amount shown to be paid on any of such notes; provided that if such balance is not sufficient to pay all of said notes with interest, then that he distribute said balance pro rata among the owners of said notes; that if any balance remains in his hands after paying said notes in order of their maturity, as aforesaid, that he distribute such latter balance among the bond holders pro rata.

Reversed and remanded.

Not to be reported

IN THE
APPELLATE COURT OF ILLINOIS.
FOURTH DISTRICT.

FILED

FEB 12 1930

Robert B. Rios
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

CHARLES DURFEE,
Plaintiff in Error)
vs.)
R. S. Morrow & SON, et al.,)
Defendants in Error.

Error to
Circuit Court of
Saline County.

256 I.A. 617

Opinion of Justice Fred G. Wolfe.

This case was commenced by the plaintiff in error, Charles Durfee, filing a bill in the Circuit Court of Saline County on November 19, 1927, praying that all moneys coming into the hands of the defendants in error R. S. Morrow & Son, for work done on railway construction for the defendant, Southern Illinois & Kentucky Railway Company, by E. S. and Forest Kelley be declared a trust fund in the hands of said Morrows for the benefit of the plaintiff in error; that they be ordered to pay the full amount due the plaintiff in error from said Kelleys and that R. S. Morrow & Son be required by the order of the court to affirm or disaffirm an account stated in said bill. It is conceded that the two defendants in error, A. Guthrie & Co., and the Southern Illinois & Kentucky Railway Company, have paid to R. S. Morrow & Son all moneys alleged due E. S. and Forest Kelley, and the controversy is between the said Charles Durfee and R. S.

demurrer to the bill, the specific ground for the demurrer being that E. S. and Forest Kelley, co-partners, were not made ^{parties} to the bill. The demurrer being overruled, the plaintiff in error filed an answer to the merits of the bill. After hearing the evidence by these two parties to sustain the bill and the answer, the chancellor, upon motion of the defendant in error, dismissed the bill for want of equity. By answering after a general demurrer is overruled, the right to assign error in overruling the demurrer is waived. Gleason & Bailey Mfg. Co., v. Hoffman, 168 Ill. 26.

However, it is contended by the defendants in error that although the bill may contain sufficient allegations authorizing a court of equity to take jurisdiction, still the case by the proff was one wherein the plaintiff in error had a complete and adequate remedy in law, and the lower court would not have been justified in retaining jurisdiction to determine if there should be introduced a money decree in favor of plaintiff in error. In support of their position, defendant in error cite Brauer v. Laughlin, 235 Ill. 265.

The allegations of the bill, forming the basis of its prayer are that the Kelleys being without funds to undertake the construction work on said railway, applied to plaintiff in error for money with which to carry on the work; that he advanced to them for that purpose the sum of \$40,000.00, and as a means of securing payment for said advances, the Kelleys executed and delivered to plaintiff in error a written assignment. The assignment is set out in haec verba in the bill and under which the plaintiff in error claims he had a vested right in the alleged trust fund. The alleged assignment is dated March 1925, and directed to the defendants in error authorizing them to execute and

deliver all checks or other means of payment to be paid to E. S. Kelley and Forest Kelley for all work performed by them under their agreement with the defendants in error; that such payment shall stand as payment to the said Kelleys as if the same had been made directly to them; the instrument further appointed the plaintiff in error attorney for the Kelleys to receive, receipt and discharge the said defendants in error for payment of all moneys accruing to Kelleys by reason of work done on said railway with full power of substitution and revocation. The alleged assignment, which will hereinafter be referred to as Exhibit 1, was executed before the Kelleys had earned any money for work done under their contract with the defendants in error.

It is evident that the bill was drawn on the theory that Exhibit 1 is an equitable assignment absolute to plaintiff in error of all of the funds coming into the hands of the defendant in error in payment for the work to be performed by the said Kelleys and that the defendants in error, after notice, held the same as a trustee for the plaintiffs in error as assignee, and that a court of equity has jurisdiction to enforce the trust. Plaintiff in error urges no other grounds of equitable jurisdiction. The Kelleys were not made parties to the suit. On the hearing the plaintiff in error introduced evidence tending to show that the amount which had been received by the defendants in error for work done by the Kelleys during the months of October, November and December, 1925, no part of which has been paid to the plaintiff in error; Exhibit 1 was admitted in evidence and defendants in error were served with a duplicate copy thereof on April 19, 1925.

The work done by the Kelleys was under a

contract entered into by them with the defendants in error. The plaintiff in error rested his case upon this showing and the defendants in error made a motion to dismiss the bill for want of equity which was overruled.

In answer to the bill the defendants in error admitted the following facts, and which both parties concede are shown by the evidence in the case. That the said Southern Illinois & Kentucky Railway Co., undertook the construction of a road bed for a line of railroad and entered into an agreement with the said A. Guthrie & Co., for the construction of certain portions of said road bed, who sub-contracted a portion to the defendants in error; that defendants in error on February 23, 1925, sub-contracted that portion of the construction of said road bed between stations Nos. 5410, & 5545 in this State, to the said Kelleys and that ninety per cent of the contract price of the work was done during each month, as shown by the estimate of the engineer of the railway company, should be paid to said Kelleys each month, the remaining ten per cent being deferred until the completion of the work undertaken by the Kelleys. That Exhibit No. 1 was executed and delivered to defendants in error who paid to plaintiff in error checks for work done up to and including the month of September, 1925, by virtue of the provisions of Exhibit 1.

The answer further alleges that the Kelleys continues to work under said contract until some time in December, 1925, and that they then failed and neglected to keep and perform the terms and conditions of their contract with the defendant in error prior and subsequent to that time. Also that the work undertaken by the Kelleys under their contract with the defendants in error was completed sometime in November, 1927, by A. L. Robbs under a contract entered into between himself

and the defendants in error after the Kelleys quit on their contract. It is conceded by the plaintiffs in error that the Kelleys stopped under their contract about December 18, 1925, and that Robbe finished the work. The answer also avers that the defendants in error have paid to plaintiff in error under Exhibit 1 more than was due said Kelleys under the terms of the contract. On the trial, the answer was amended by inserting that the defendants in error were hindered and delayed in the performance of their contract with A. Guthrie & Co. on account of such default of the Kelleys, and were damaged to the amount of \$10,000.00.

The contract between the defendants in error and the Kelleys contains a schedule fixing the prices to be received by the latter, per unit measure, for clearing, grubbing, grading, hauling, etc. for the construction of the road bed. The Kelleys were to be paid for their work according to estimate made under the same conditions and at the same time that the defendants in error received payments for estimates from A. Guthrie & Co., and upon completion of the entire work called for in their contract according to its stipulations, the Kelleys were to receive full payment for the work. The evidence shows that the defendants in error received from A. Guthrie & Co. payments for estimates for work done by the Kelleys under their contract for October, November and December, 1925, including \$3899.48, which amount is ten per cent of the estimates of the work performed by the Kelleys from the time they began to work on the contract until they quit some time in December.

In the contract between the defendant in error and the Kelleys there are no terms in regard to ten percent of the contract price, or estimate, to be withheld and to be paid to the Kelleys upon the

completion of their work. According to their agreement, the Kelleys were to be paid estimates as above indicated, and upon completion of the work they should receive full payment for the same. There is no basis for the contention of the plaintiff in error that he is entitled to ten per cent of the entire contract price for the work performed by the Kelleys, unless it be that provision of the contract between defendant in error and A. Guthrie & Co, which provides that such ten per cent shall be withheld until the completion of the work undertaken by A. Guthrie & Co. If the plaintiff in error takes the position that the Kelleys were entitled to this ten per cent because the work was in fact completed, although by someone else, we think he cannot be sustained. We are of the opinion that the Kelleys, under their contract with the defendants in error, were not entitled to full payment until they showed a complete substantial performance of their contract. There are no allegations in the bill, nor any proof appearing in the evidence, that the Kelleys were prevented from finishing their contract by any act or omission on the part of the defendants in error. The Kelleys never completed their contract, but only about one-half thereof. Therefore, neither they nor the plaintiff in error, as their alleged assignee, was entitled to the ten per cent, or any part of it. (Grassman v. Bonn, 32 N. J. Equity, 48; Hazelton Mercantile Co. v. Union Improvement Co., 143 Pa. 573, 22 Atl. 906; Jackson v. Cleveland, etc. R. Co. 19. Wis. 422; Geiger v. Western Maryland R. Co. 41 Md., 4; Langdon v. Northfield, 42 Minn., 434, 44 N. W 984.)

The entire amount of the estimates, including the ten per cent thereof was paid by defendants in error to A. L. Robbs as part consideration of his agreement

to finish the work left unperformed by the Kelleys at the same price per unit as stipulated in the contract between the Kelleys and the defendants in error, and the amount was to be used by Robbs to pay such debts and liabilities of the Kelleys incurred by them in performing their said work, and which they had agreed to pay and discharge in their agreement with the defendants in error. An examination of the contract between the Kelleys and the defendants in error reveals that all portions of the "standard form of contract" embodied in the agreement between A. Guthrie & Co. and the defendants in error are expressly made binding, so far as applicable, upon the Kelleys and the defendants in error.

By paragraph 9 of their contract the Kelleys agreed, if required by the defendants in error, to furnish sufficient proof as might be required, that all claims against them in or on account of the work performed by them under their contract had been fully paid and settled.

Article 19 of the standard form of contract provided that the contractor shall settle and satisfy all claims for labor, material and supplies arising on account of the work performed under the contract. Should the contractor fail to do so, the railway company had the right, in its discretion and at such time as it deemed advisable, to compromise or settle any claims mentioned in Article 19, and such compromise or settlement was made binding upon the contractor. Article 19 of the standard form of contract, under the terms of the agreement with the Kelleys and the defendant in error, became a part of the latter agreement.

In their answer the defendants in error alleged that the Kelleys before some time in December, 1925, had not paid for the labor performed under their

agreement with the defendants in error and were in default under the terms and conditions of said contract; and that defendants in error discontinued making payments for the work performed by the Kelleys for the reason that they so defaulted. Evidence was introduced by the defendants in error for the purpose of sustaining these allegations of their answer and consisted of many alleged debts and liabilities unpaid by the Kelleys incurred, it is contended, in the performance of their said agreement. These accounts included labor, grocery, power, oil, gas and various other bills against the Kelleys. The insurance premiums to be paid by the Kelleys for the protection of themselves and the defendants in error against claims under the Workmen's Compensation Act, had to be determined to arrive at a correct amount due the Kelleys from the defendants in error. The evidence further shows that the personal debts of the Kelleys, and their expenses for doing other work on a hard road, were intermingled with the alleged unpaid debts for the work done under their agreement. The defendants in error claimed damages from the Kelleys because of their failure to finish the work called for by their contract. Exhibit 1, the alleged assignment, was to secure the plaintiff in error for moneys advanced by him to the Kelleys and was not an absolute assignment. If an assignment, it transferred future earnings of the Kelleys. The accounts between the parties to the suit and the Kelleys, were therefore, mutual and intricate and from the evidence we find that, if the Kelleys had been made parties to the suit, a court of equity would have had jurisdiction to fix the rights of all the persons interested in the alleged fund, under the general prayer for relief contained in the bill.

From the proceedings and evidence in this case we are of the opinion that E. S. Kelley and Forest Kelley were necessary parties to this suit. In Riley v. Webb, 272 Ill. 537, it is said: "In equity all persons who have any substantial, legal, or beneficial interest in the subject matter in litigation, and who will be materially affected by the decree must be made parties, and the Court is not authorized to proceed to a decree if the bill shows that a person having a substantial interest has not been brought into court."

The defendants first raised this question by demurring to the bill, alleging that the Kelleys were necessary parties and were not made a party either plaintiff or defendant in the suit. At the close of the plaintiff's case the defendant again raised this question by making a motion to dismiss the bill for failure to make Kelleys parties to the suit. The court overruled the motion, stating as one of his reasons for so doing that he wanted to hear the evidence of the defendants. At the close of all the evidence the defendant again raised this question by a motion to dismiss the bill for want of equity and by failure to make the Kelleys parties to the suit. The court, without giving a specific reason therefor, dismissed the bill for want of equity. The defendants raised this question three times before the bill was finally dismissed. The plaintiffs, to preserve their rights should have made some effort to make the Kelleys, parties to the suit. They made no effort so far as the records show, to have the Kelleys brought into court that a proper adjudication of the rights of the parties could be had.

We are of the opinion that the Chancellor properly sustained the motion of the defendant to dismiss the bill for want of equity and by the failure to have the necessary

parties in court for a proper adjudication of all the claims.

The decree of the Circuit Court of Saline County is hereby affirmed.

Not to be reported

IN THE
APPELLATE COURT OF ILLINOIS,
FOURTH DISTRICT.

October Term, A. D., 1929.

| | | |
|------------------------------------|---|-----------------|
| GUS A. EISKANT and G. M. MILLER, |) | |
| Partners, Doing Business Under the |) | |
| Firm Name and Style of |) | |
| MILLER AUTO LAUNDRY COMPANY, |) | Appeal from the |
| Appellees, |) | City Court of |
| vs. |) | East St. Louis, |
| |) | Illinois. |
| LEO KOSYDOR, |) | |
| Appellant. |) | |

Opinion by Justice Fred G. Wolfe.

Mr. August G. Reis, of Belleville, Illinois, was the owner of a garage and lot situated in the City of East ST. Louis, Illinois. Mr. Reis in April, 1924, entered into a lease with Orville L. Dirden, George M. Miller, and Gus A. Eiskant, for the premises in question. The lease provided for a rental of \$250.00 per month during its term. In July 1924 Mr. Reis conveyed this property to the appellant, Leo Kosydor. In March 1925 the appellant brought a suit of forcible entry and detainer against the appellee in a Justice of Peace's Court, which was later appealed to the City Court of East ST. Louis, Illinois. On the 29th of June, 1925, a stipulation was entered into in which it was agreed that, if the defendants, Gus A. Eiskant and George M. Miller would vacate the premises described in the lease on or before the first day of August, 1925, the appellant Kosydor would pay them \$500.00, which said sum was deposited with the Clerk of the Court; further, that he would waive any

IN THE
 SUPREME COURT OF THE UNITED STATES
 Petition for a writ of Habeas Corpus

Writ of Habeas Corpus

| | |
|-----------------------------------------------------------|------------------------------------------------------------------------------|
| Petitioner
John Doe
123 Main Street
Anytown, USA | Respondent
The United States
Department of Justice
Washington, D.C. |
|-----------------------------------------------------------|------------------------------------------------------------------------------|

Opinion of the Court

The Court is divided 5-4 in its opinion. The majority, consisting of Justices Brandeis, Clegg, Ewing, and Hughes, holds that the writ of habeas corpus should be granted. The dissenting opinion, written by Justice McHugh and joined by Justices Gurnea, Ladd, and Quinn, holds that the writ should be denied. The majority opinion is based on the fact that the petitioner was not given a fair trial and that the evidence against him was unreliable. The dissenting opinion is based on the fact that the petitioner was given a fair trial and that the evidence against him was reliable.

claim that he might have against the defendant for rent. The \$500.00 was paid by Mr. Kosydor to the Clerk of the Court by Mr. Kosydor delivering his check for the amount. The appellant Kosydor claimed that the defendants did not comply with the terms of the stipulation to vacate the premises on or before the first day of August, 1925, and went to the Clerk of the Court and demanded the return of his check. Upon said demand the Clerk returned to Mr. Kosydor the check for \$500.00.

At the September Term, 1925, of the City Court of East St. Louis, the appellants filed their suit in assumpsit against the appellees to recover this \$500.00. The appellant filed a plea of general issue and two special pleas. The special pleas assert that the appellants had leased the premises and had not vacated them according to the stipulation, but had sub-let a part of the premises to W. H. Sturh, and that the sub-letting was unknown to the appellant at the time the stipulation was entered into and was without the written consent of either the original owner of the property, or appellant, and that Sturh, the sub-tenant and the original tenants were in possession of the property several months after August 1st, 1925. The appellant also filed a Plea of Set-off, alleging that the plaintiffs were indebted to him in the sum of \$2250.00 for unpaid rent upon the premises.

A trial was had at the January Term of said Court, 1929, and a verdict rendered in favor of the appellees for the sum of \$500.00. Judgment was entered on the verdict after a motion for a new trial, arrest of judgment, etc., and the case is brought to this Court upon appeal.

This case was tried before a jury, and there is no question raised in this record that the the jury was not properly instructed relative to the law in the case. The jury, by their verdict, have found that the appellees

had complied with the terms of the stipulation and vacated the premises in question on or before the first day of August, 1925. While there were other questions of fact, this was the important question to be decided, and the jury, by their verdict, found that the appellees were entitled to recover \$500.00 as set forth in the stipulation. From an examination of the record we cannot say that the verdict is manifestly against the weight of the evidence, and unless we can do so we would not be justified in setting aside the verdict. We think that the evidence sustains the verdict.

Complaint is made relative to the admission of evidence of Eiskant, Miller and Stuhr, over the objection of counsel for appellant, in which they testified to a conversation that took place in July 1925. According to the testimony of these parties the appellant agreed to allow Stuhr to remain in the premises in question until he could find another place. This conversation took place after the stipulation had been signed. If the appellant agreed to let Mr. Stuhr stay in the premises after Messrs Eiskant and Miller had vacated the property he had a right to make such an arrangement with Mr. Stuhr. It was not error for the trial court to admit this testimony.

Objection is made to the closing argument of Mr. McGlynn. In our view of the case the main issue is whether the appellees vacated the premises by the time set forth in the stipulation. If they did so vacate the premises, then they are entitled to recover the \$500.00 set forth in the stipulation. While the argument of Mr. McGlynn seems to be outside the record, we are of the opinion that it is not reversible error in this case.

We find no reversible error in the case and judgment of the City Court of East St. Louis is hereby affirmed.

Not to be reported

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT.

October Term, A. D. 1929.

W. S. STORMONT,
Appellant,
vs.
A. N. CRUTCHFIELD,
Appellee.

Opinion by Judge Fred G. Wolfe.

A suit was brought by W. S. Storment, a real estate broker of Salem, Illinois, against A. N. Crutchfield, to recover a commission alleged to be due for the sale of real estate in Salem, Illinois. The suit was originally brought before a Justice of the Peace, where there was a judgment for the Plaintiff in the sum of \$225.00. The Defendant below, A. N. Crutchfield, took an appeal from said judgment to the Circuit Court of Marion County, Illinois, where a trial was had before the jury, resulting in a verdict for appellee. After motion for new trial was filed and overruled by the Court, judgment was rendered on the verdict, and from this judgment the case was brought to this Court on appeal.

The appellant contends that the Court erred in refusing to admit competent and material evidence offered on the part of the appellant, and striking material evidence from the record on the part of the appellant; in failing to fully and accurately instruct the jury as to the law covering issues involved; in refusing to give

THE

REPORT OF THE

COMMISSIONER

OF THE

LAND OFFICE

IN RESPONSE TO A RESOLUTION PASSED BY THE HOUSE OF REPRESENTATIVES, JANUARY 18, 1870, RELATIVE TO THE LANDS BELONGING TO THE UNITED STATES.

WASHINGTON: GOVERNMENT PRINTING OFFICE, 1870.

(Printed by order of the House of Representatives.)

The following is a summary of the report of the Commissioner of the Land Office, in response to a resolution passed by the House of Representatives, January 18, 1870, relative to the lands belonging to the United States. The report contains a general statement of the condition of the public lands, and a detailed account of the various surveys and discoveries made during the year. It also contains a list of the lands that have been sold or leased during the year, and a statement of the amount of money received from the sale or lease of these lands. The report is divided into two parts: the first part contains a general statement of the condition of the public lands, and the second part contains a detailed account of the various surveys and discoveries made during the year.

(Continued.)

The following is a summary of the report of the Commissioner of the Land Office, in response to a resolution passed by the House of Representatives, January 18, 1870, relative to the lands belonging to the United States. The report contains a general statement of the condition of the public lands, and a detailed account of the various surveys and discoveries made during the year. It also contains a list of the lands that have been sold or leased during the year, and a statement of the amount of money received from the sale or lease of these lands. The report is divided into two parts: the first part contains a general statement of the condition of the public lands, and the second part contains a detailed account of the various surveys and discoveries made during the year.

proper instructions offered on the part of appellant; and that the verdict of the jury is contrary to the manifest weight of the evidence.

The appellant had been continuously engaged as a real estate broker for about twenty-three years, in the City of Salem, Illinois. The appellee lived in the City of Salem, and worked for a Railroad Company for the past twelve years or more, and he and the appellant had been good friends and acquaintances for several years prior to the time of this litigation.

On or about August 3, 1927, the appellee Crutchfield requested the appellant Storment to sell his residence property in the City of Salem, which he priced at \$4500.00. The appellant Storment made a vest pocket memoranda of the transaction, and it was signed by Crutchfield. The memoranda is as follows:

"I have given W. S. Storment the sale of my modern six (6) room home, garage, one lot, price \$4500. If sold, I will pay 5% commission. This contract is for 90 days. Building and Loan mortgage of \$3100.00."

After entering into this contract, the appellant made an effort to sell the property for \$4500.00, but was unable to do so within 90 days, the time limit fixed in the written contract. Sometime after the expiration of the time designated in the written contract, the appellant took Paul Cain, a resident of Salem, Ill., to look at a house that was for sale near the appellee's home. This house was not satisfactory to Mr. Cain, and he stated that he wanted a house with hard wood floors. The appellant then took Mr. Cain to see the house of the appellee, and told him that it was for sale, and thought it could be bought for \$4200.00. Appellee was at home at this time, and showed appellant and Mr. Cain through the

properly identified, it is not to be considered as the basis of any claim, and that the nature of the claim is to be determined by the facts of the case.

The applicant has shown that the invention is a new and useful improvement in the art of making and using a certain article, and that the same is capable of being made and used in a manner which will enable it to be used in a manner which is not known to the public.

It is a well known fact that the invention is a new and useful improvement in the art of making and using a certain article, and that the same is capable of being made and used in a manner which will enable it to be used in a manner which is not known to the public.

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Some time later during the same day, Cain and his wife returned to the appellee's home, and introduced themselves to the appellee and his wife, and looked over the property and left. Shortly after the Cains had examined the property, the appellee sold the property to the Cains for \$4500.00. Shortly after the property was sold, appellant and appellee met in Salem, and appellant told the appellee that he was entitled to commission on the sale of the property. The appellee told him he was not, and would not pay it.

The appellant contends that he had a conversation with the appellee in which they entered into a verbal contract by which the appellant was given authority to sell the property of the appellee. The appellee strenuously denies this, and says that they had no such conversation, and the appellant had no other authority other than had been designated in the written contract, and the time had expired, and that the contract was fully terminated. This is practically the only controverted question in the case, and a decision on this point disposes of the whole case. The jury by their verdict have found that there was no renewal of the contract of sale between the appellant and appellee. The burden of proof was on the appellant to prove by a preponderance of the evidence that he had a contract for the sale of this property. We think the evidence warranted the jury in finding that he did not have such a contract.

The first assignment of error of the appellant is that the Court erred in refusing to admit proper evidence on the part of the appellant and in striking same from the record. The evidence complained of tended to prove what effort the plaintiff had made in selling the property. If a dispute had arisen between the parties as to whether the plaintiff was instrumental in making the sale, then no doubt this evidence would have been material, but the efforts of appellant to sell the property were not dis-

puted. The sole question was whether he had authority to make the sale. We are of the opinion that the Court did not err, either in refusing to admit the offered evidence, or in striking the same from the record.

It is next contended that the Court erred in refusing to give instructions offered on behalf of the appellant. Examination of all these instructions discloses that the element of whether the appellant had authority to make the sale is omitted. No doubt these instructions would be good in a class of cases where that question was not involved, but when the only question was whether or not the agent ^{had authority} made the sale, it was not error for the Court to refuse to give these instructions. We think the evidence fully justifies the verdict, and we find no reversible error in this case.

The judgment of the Circuit Court of Marion County, Illinois, is hereby affirmed.

Not to be reported

IN THE
APPELLATE COURT OF ILLINOIS,
FOURTH DISTRICT.

October Term, A. D., 1929.

ZERWECK JEWELRY COMPANY,)
a Corporation, Etc.,)
 Appellant,)
 vs.)
EAST ST. LOUIS LIGHT and)
POWER COMPANY, a corpora-)
tion,)
 Appellee.)

Appeal from the
Circuit Court of
St. Clair County,
Illinois.

Opinion by Justice Fred G. Wolfe.

This is an action in case brought against the East St. Louis Light & Power Company by sixteen fire insurance companies, in the name of Zerweck Jewellery Company, their insured, and for their use as subrogees of the insured, to recover damages for the loss and damage of articles of a stock of merchandise destroyed and damaged by a fire which occurred on June 17, 1926, The Zerweck Jewellery Company was the owner of the merchandise at the time of the fire and it is not contested that the insurance companies have paid to the insured, under their respective policies and in adjustment of the loss thus sustained, the aggregate sum of \$44,700.01. There was a trial, verdict of not guilty in favor of the defendant, judgment for court costs against the plaintiff and an appeal taken to this court by plaintiff to reverse the judgment. Four assignments of error are urged as grounds for reversal, which are: (1). The refusal of the court to permit an expert witness of the plaintiff to testify in rebuttal; (2). Hypothetical questions asked by the defendant included improper elements and failed to include proper elements shown by the evidence and which should have been incorporated in the

questions. (3). The Court permitted defendant to ask its witnesses, in chief, leading questions over the objections of plaintiff; (4) The verdict is against the clear preponderance of the evidence.

Defendant, as to the first error assigned, denies that the evidence attempted to be introduced by the plaintiff was rebuttal testimony. Defendant maintains such evidence is admissible as tending to prove the gist of the action stated in the declaration and, therefore, while admissible in the first instance, it was admissible only in the discretion of the trial court when offered at the close of defendant's evidence.

The substantial parts of the declaration, so far as necessary to be noticed for the purpose of this opinion, are as follows: That the plaintiff on June 17, 1926, was the owner of a stock of merchandise at number 348 Collins Avenue. East St. Louis. That defendant maintained a plant and system for the distribution of electricity for hire to customers, including plaintiff. That in said building there was located apparatus through which such electricity was distributed to lights and other instruments in the building; that about one month before June 17, 1926, the defendant installed in said premises an appliance known as a "demand meter, together with wiring attached to the apparatus previously maintained in the building by the plaintiff; that the demand meter and wiring were the property, installed and maintained by defendant from the time of installation and were exclusively under its control; that it was the duty of defendant in installing and maintaining said demand meter and wiring, and in causing electricity furnished to plaintiff to pass through or over said wiring and 'demand meter, to use such care as was commensurate with the danger and to maintain wiring of sufficient size and

carrying capacity and sufficient insulation to carry safely currents of electricity passing through or over same and to prevent such electricity from igniting the goods and property of the plaintiff in said premises. That defendant disregarded said duty and negligently failed to use such care to arrest dangerous currents of electricity from passing through said wiring and demand meter, and in consequence of such failure a dangerous electrical current consisting of a bolt or flash of lightning was on said date transmitted over, upon, and through said wire and demand meter, thereby causing said property of plaintiff in said building to become ignited and burned. The Second count adds the charge that the wiring so placed by defendant was of insufficient size and carrying capacity and of insufficient insulation, and in consequence of such failure on the part of said defendant, said electric current passing through said wiring aforesaid, caused said property of plaintiff in said building to become ignited and burned. The Third count contains the charge that defendant failed to use due care to provide the arrest of the lightning between its transformer and said premises so as to prevent flashes of electricity from entering said premises, and by reason of such failure lightning did enter and cause the property of the plaintiff to become ignited and burned. To the declaration the defendant filed the plea of general issue to which the plaintiff filed a general replication. There is no evidence in the record tending to prove the allegations of negligence of the third count, and the issue in the case must turn on the charge that the wiring to the demand meter was the cause of the igniting and burning of the plaintiff's merchandise.

The plaintiff proved, in chief, as follows: That the main service wires of the defendant extended from the transformer on a pole in the street, and in the vicinity of the building, to the premises of the plaintiff. That the building

was wired for a flat rate service and a house service on a meter. The flat rate service consisted of a switch and a distributing panel which furnished the current for the lights in the show windows of the store and an electric sign attached to the front of the building. The house service was connected with another switch and distributing panel between which two instruments there was a meter on a loop of the wiring. There was also a main service switch contained in a metal box wherein were also the fuses to protect the inside wiring and apparatus against an overcharge of electricity. All these appliances, with others, were located in the northwest corner of the store near the show window in that corner of the store. The plaintiff further proved that some time before the fire the defendant installed the demand meter on the other frame work forming the back of the show window in the northwest corner of the store room and connected with it, through the switch-box, with wiring which extended to an appliance or instrument already in place. The wiring to the demand meter was fastened to the existing wires ahead of the fuses, then in the building, and was connected back below the fuses. That there was no fuse control provided for the demand meter, which was the property of the defendant and maintained by it, and was made a part of the house service to check the load used by this service. That shortly after midnight of June 17, 1926 there was a severe electric storm and a bolt of lightning struck the front part of the plaintiff's building or the electric sign fastened to the building. That immediately after the lightning flashed the fire broke out inside the store at the north window where the check meter and other appliances were located. The fire was confined to this spot. The wood work in the front end of the store near the said north window was charred by the fire for a distance of about fifteen feet and

where the check meter was located the woodwork was burned and charred very badly. After the switch was pulled by the firemen flashes of electricity still kept coming into the store until the wires leading into the building were cut. The greater portion of the merchandize was located in the store back from the front window and was injured by heat and not burned by any flames.

The plaintiff further proved by Charles M. Brown, City electrician of East ST. Louis, that the wires leading into the building entered the building through a conduit and that after the fire he could not see anything that was inside of the conduit, nor could he see anything wrong with the outside wiring; that these wires and the conduit were what is known as standard. Thereupon the plaintiff asked the witness Brown as an expert a hypothetical question which assumed that there was no fuse control of the demand meter, and asking if such condition of the wiring might reasonably have caused the fire. The witness answered the question by saying: "Well, the only way I could answer would be, yes, it would be possible to do it.", without an explanation. The plaintiff also introduced several photographs, taken after the fire, showing the location of the demand meter fuse box, switch box, and other apparatus located in the northwest corner of the building. The purpose of the above summary of the evidence introduced by the plaintiff, in the first instance, is not intended to be conclusive or complete in detail, but its purpose is to show substantially the evidence upon which the plaintiff relied to support the allegations of the declaration that the wiring of the demand meter caused the igniting and burning of the merchandize.

By his cross examination of plaintiff's witnesses the defendant elicited the facts that the entire ceiling of the store room was a metal one; that there was a conduit pipe in the building containing wire leading from the fuse box to

the ceiling; and that the witness Brown made no examination of the inside wiring in this conduit.

The defendant introduced expert testimony showing that the demand meter was a very delicate instrument, the inner coils of which would open and break the circuit of electricity, under a less voltage than would pass through a fuse without blowing the fuse; that no fuses were used, by electricians to protect a demand meter; that if the demand meter was attached above the fuse located in the building and an excess current opened the coils in the demand meter the fuses would have been blown. This evidence of the defendant was undoubtedly to meet the plaintiff's evidence, the purpose of which was to prove that the demand meter had not been properly protected by fuses. In addition to the evidence so introduced by the defendant, the defendant further proved that the fuses in the transformer that served the building were taken out within about three minutes after the lightning stroke. That the conduit pipe coming into the building was a horizontal pipe seven or eight feet long next to the ceiling and extended down to the boxes and meters in the store; and that the wires in the conduit had been burned off and they were exploded and the wires in the rear of the building near the metal ceiling were burned into. The defendant then propounded a long hypothetical question to several experts embodying many of the facts and elements shown by the evidence, the essential assumption of which question was, that the fuses had not blown and that the wires inside the conduit were burned off and exploded and in the rear of the building near the metal ceiling wires were burned into. The purpose of the question was to procure an opinion if the demand meter, under the conditions thus shown, and the wiring being attached to the box containing the fuses and the switch, had, or could have had anything to do with starting the fire. The

answer being that the demand meter and wiring had no effect whatever on the fire.

After the close of the defendant's evidence the plaintiff called an expert electrician and asked him the identical hypothetical question which was asked by the defendant, but the witness was not permitted to answer the question over the objections of the defendant that the evidence was not rebuttal.

The main controverted point in this case is whether the demand meter installed and maintained by the defendant was the proximate cause of the fire. The plaintiffs introduced their evidence tending to show that the fire was caused by the faulty construction and installation of the demand meter. The plaintiff also produced an expert witness who in answer to a hypothetical question stated that in this opinion the fire could be caused by the demand meter as constructed and installed. The defendant's evidence was to controvert this and show that the demand meter could not have caused the fire. In our opinion the trial court properly held that the evidence offered in rebuttal should have been offered in chief and not in rebuttal.

The hypothetical questions were in proper form and the answers to the leading questions, if any, were not prejudicial to the plaintiff. In our opinion the verdict is clearly sustained by the evidence and we find no reversible error in the case. The judgment of the Circuit Court of St. Clair County is hereby affirmed.

Not to be reported



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